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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 119

SAMUEL REISMAN, and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN, and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & Co. (a co-partnership), *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: May 8, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

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No.

SAMUEL REISMAN, and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN, and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on February 7, 1963.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court, and Order thereon (R. 145-150), printed in Appendix B hereto, infra, pp. 9a-14a, are reported in 61-2 USTC § 9673 (1961).

The Opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 3a, has not yet been reported.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on February 7, 1963. See Appendix B, p. 9a, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. The first question presented is whether a suit to restrain the Commissioner of Internal Revenue from enforcing a subpoena issued under color of § 7602, Internal Revenue Code of 1954, but actually in violation of the Fourth Amendment to the Constitution, is barred by the Sovereign Immunity Doctrine.

2. The second question presented is whether a taxpayer—faced with an unexplained multi-million dollar claim for federal taxes—may be deprived of the effective assistance of Counsel in a pending Tax Court proceeding, by Respondent Commissioner's forcing Counsel to reveal to him their entire trial preparation in advance of trial.

3. The third question presented is whether an attorney who has hired a Certified Public Accountant to assist him in preparation for trial and in advising a taxpayer client, has "standing to sue" in order:

(a) to protect his own ability to fulfill his duty as an officer of the Court and attorney-at-law;

(b) to protect against appropriation by opposing Counsel of his property rights in his work-product.

4. The fourth question presented is whether the attorney-client privilege against disclosure by the attorney of confidential communications between him and his client extends to non-lawyer accountants and clerks, employed by the attorney.

STATUTE INVOLVED

The Statutory provisions involved are Sections 7602 and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, 7604. They are printed in Appendix A, *infra*, pp. 1a to 2a.

STATEMENT OF THE CASE

Petitioners are Los Angeles and Washington attorneys. They represent two United States citizens, Martin and Allyn Bromley, husband and wife, in connection with alleged tax deficiencies which are the subject matter of pending litigation in the Tax Court and of continuing criminal and civil investigation by Respondent Commissioner of Internal Revenue.

Petitioners were retained after the tax controversies arose and had no part in the preparation of the tax returns.

Upon accepting the engagement, as was and is their custom in tax cases of this magnitude, Petitioners TRAMMELL, RAND & NATHAN employed Respondents PEAT, MARWICK, MITCHELL & Co., a firm of Certified

Public Accountants, in order to assist them in their preparation for trial in the Tax Court, by gathering information for Petitioners from the clients and by interpreting such information to Petitioners.

Respondents PEAT, MARWICK, MITCHELL & Co., prior to their having been retained by Petitioners TRAMMELL, RAND & NATHAN, had no contact whatever with, and did not know, the taxpayers. The tax returns in issue were prepared by another Certified Public Accountant.

Petitioner-attorneys paid several thousands of dollars to the accountants for this preparatory work. Trial in the Tax Court was set for October 1961. On June 30, 1961, Respondent Commissioner, under color of proceeding under Section 7602, Internal Revenue Code of 1954, subpoenaed three branches of the Respondent accounting firm (in Los Angeles, Chicago and New York) to testify on their work prior to trial and before a Special Agent of Respondent Commissioner. The subpoena also required the accountants to turn over to the Commissioner all documents, work papers and other material in their possession.

Respondent-Accountants advised Petitioner-Attorneys that they would produce the requested documents and would testify fully, so as not to risk contempt proceedings for failure to do so. To avoid disclosure and unlawful appropriation of their work-product and to prevent the seizure without warrant of confidential and privileged documents for future use as evidence in possible criminal proceedings, Petitioners moved for, and obtained a temporary Restraining Order in the United States District Court for the District of Columbia. Several weeks later (but still prior to trial in the Tax Court), another Judge of the same Court dis-

solved the Restraining Order, dismissed the Complaint and found that Petitioners had no "standing to sue".[1]

The Court of Appeals for the District of Columbia Circuit affirmed the Judgment of the District Court, holding that the Complaint was properly dismissed, but for different reasons than those relied on by the District Court, namely, that:

> "... it is not within the Court's jurisdiction because it is, in substance, a suit against the United States to which it has not consented."
>
> —Opinion, p. 4.

Petitioners respectfully submit that the Court of Appeals was in error in holding that the suit falls within the Sovereign Immunity Doctrine, and that the District Court was in error in holding that Petitioners had no standing to sue.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the District of Columbia Circuit is in direct conflict with (1) the decision of the United States Court of Appeals for the Ninth Circuit in *DeMasters* v. *Arend*, 313 F. 2d 79 (1963) (App. C, *infra*, pp. 17a, *seq.*), and (2) the decision of the Circuit Court of Appeals for the Second Circuit in *Application of Colton*, 291 F. 2d 487 (1961) (App. C, *infra*, pp. 33a, *seq.*).

[1] By Stipulation and Order based thereon, Respondent Commissioner refrained from enforcing the Summonses pending disposition of the Appeal in the Appellate Court. He has opposed a further stay of enforcement proceedings pending disposition of this Petition because of the "*imminent running of the Statute of Limitations on possible criminal offenses*". (Opposition, p. 2); (Emphasis supplied).

The Court below held, on the authority of *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457 (1949) and *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980 (1962), that:

> "The suit accordingly seems to us to be an effort to restrain the United States, and therefore to fall within the sovereign immunity doctrine."
>
> —Opinion, p. 4 (App. B, *infra*, p. 6a).

The Court of Appeals for the Ninth Circuit in *DeMasters* v. *Arend* held on the authority of the identical cases of *Malone* v. *Bowdoin*, *supra* and *Larson* v. *Domestic & Foreign Commerce Corporation*, *supra*,[2] that such suit:

> "would not be barred by the doctrine of sovereign immunity."
>
> —Opinion, at p. 85
> (App. B, *infra*, pp. 20a-21a).

The Court of Appeals for the Second Circuit in the *Colton* case, *supra*, (at pp. 489, 490), (App. B, *infra*, p. 36a), held that such suit is not "against the Government without its consent".

The jurisdictional facts relied on by the respective plaintiffs in the *Arend*, *Colton* and *Reisman* cases, on the other hand, are identical. In all three cases the contention is that the respective Respondents, the in-

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[2] The Court of Appeals for the Ninth Circuit is

> ". . . also satisfied that this taxpayer's suit is neither one for declaratory judgment 'with respect to federal taxes' precluded by 28 USC § 2201; nor an action 'for the purpose of restraining the assessment or collection of any tax' precluded by 26 USCA § 7421 (a)".
>
> (ibid., footnote 8).

dividual Special Agent [DeMasters] or the Commissioner directing the Special Agent [Respondent Caplin] in whose very name the subpoenas were issued (J.A. p. 19), acted unlawfully and beyond their respective Statutory authority.

The Court of Appeals for the District of Columbia Circuit, we submit, erroneously, held that, "in this case the Commissioner does not appear as yet to have departed from his Statutory authority" (p. 7a, *infra*). The uncontradicted complaint below, supported by a sworn affidavit, alleged just that: namely, that the Respondent has not issued the summons for any of the enumerated Statutory purposes,

> "of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability"
>
> —26 U.S.C. 7602 (App. A, *infra*, p. 1a).

On the contrary, the complaint and the uncontradicted affidavit show that the summons was issued in violation of the Statutory command, for the sole purposes of obtaining attorneys' trial preparation and evidence to be used in criminal prosecution of their clients, in violation of the Fourth Amendment.

In the Court below, Respondent admitted that he wanted the books and records and work papers involved, in view of the pending cases before the Tax Court (J.A., p. 83). In this Court, in opposing Petitioners' Application for a Stay of Mandate, Respondent urged that these records were important in view of

the "imminent running of the Statute of Limitations on possible criminal offenses".

It is respectfully submitted that Congress carefully spelled out and enumerated in § 7602 of the Internal Revenue Code of 1954, all purposes for which a Revenue subpoena may be used. *Expressio unius est exclusio alterius. Continental Casualty Co.* v. *U. S.*, 314 U.S. 527, 533; 62 S. Ct. 393, 396 (1942). The purposes for which the subpoenas were sought in the case at bar are not authorized by Statute. The Respondent therefore acted illegally, beyond his Statutory authority and in violation of Constitutional and common law rights of Petitioners and their clients.

As the United States District Court for the District of Columbia held in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 103 F. Supp. 569 (at p. 576) (1952), affirmed by this Court at 72 S. Ct. 863:

> "Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment" [citing Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628; Land v. Dollar, 330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209; Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570; United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171.]

2. The Court below conceded that Respondent's actions may indeed be illegal. (Op. p. 6, App. B, p. 8a, *infra*). Nevertheless, the Court erroneously held that Sec. 7604 constitutes Petitioners' exclusive avenue of judicial review. It is submitted that this holding

was incorrect as a matter of law. *Application of Colton, supra; DeMasters* v. *Arend, supra; Application of Daniels,* 140 F. Supp. 322 (U.S.D.C. S. D. N.Y., 1956); *International Commod. Corp.* v. *Internal Revenue Service* 224 F. 2d 882 (C.A. 2, 1955); *In re Turner,* 309 F. 2d 69 (C.A. 2, 1962). Cf. *Rusk* v. *Cort,* 369 U.S. 367, 82 S. Ct. 787 (1962).

The holding was also erroneous on the facts in this case. The record shows that the accountants would have complied with the subpoena rather than risk[3] contempt proceedings (J.A. 46).

3. The questions presented by this petition are of importance to the administration of Sec. 7602 of the Internal Revenue Code and to the protection of citizens' rights under the Fourth and Fifth Amendments to the Constitution.

They are also of importance in the general administration of justice in relation to the attorney-client privilege.

It is recognized as a practical matter that in litigation of certain magnitude or technical difficulty, an attorney must avail himself of the services of non-attorney assistants, as, for instance, clerks, stenographers, interpreters and accountants. The cases in the several circuits, however, are in conflict as to the applicability of the attorney-client privilege to such non-attorney

[3] The justification for the accountants' apprehension was shown to the Court below upon its specific post-argument inquiry, by citation to *Application of U.S. (Carroll),* 246 F. 2d 762; 149 F. Supp. 634 (US DC SD NY, 1957); *In re Wolrich,* 84 F. Supp. 481 (US DC SD NY, 1949); *Sale* v. *United States,* 228 F. 2d 682 (C.A. 5, 1956); and *U. S.* v. *Becker,* 259 F. 2d 869 (C.A. 2, 1958), 58-1 USTC 9403.

assistants. In *U. S.* v. *Kovel*, 296 F. 2d 918 (C.A. 2, 1961), the Court of Appeals for the Second Circuit has recognized a narrow privilege where the communication is made in confidence to an accountant for the purpose of obtaining legal advice from the lawyer (at 922).

In the case at bar, the District Court's finding that what was sought was "accounting advice" was clearly erroneous. The client had never consulted the accountant. On the contrary, the accountant sought from the client, in confidence and for the lawyer, the information required by the lawyer to try the client's case. It should have granted the injunction even under the narrow *Kovel* rule. But the decision of the Court below is in conflict also with the decision of this Court in *Hickman* v. *Taylor*, 329 U.S. 495; 67 S. Ct. 385 (1947). Unless reversed, it permits Respondent in the future to appropriate the work-product of every attorney using an accountant in preparing a tax case. Cf. *Alltmont* v. *United States*, 177 F. 2d 971 (C.A. 3, 1949); *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (C.A. D.C. 1948); *Carpenter-Trant Drill Co.* v. *Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D.C. D. Nebr. 1959).

4. The taxpayer personally and through his attorney specifically claimed his Constitutional privileges under the Fifth Amendment. The privilege was properly claimed. *Grant* v. *U. S.*, 227 U.S. 74 (1913), 33 S. Ct. 190; *Brody* v. *U. S.*, 243 F. 2d 378 (1957); *Application of J. M. House*, 144 F. Supp. 95 (D.C. Cal., 1956), and *Colton, supra.* Respondent has declared before this Court that the evidence is required for criminal prosecution. But even without this open admission, the

attempted violation of Constitutional rights was patent.[4] Therefore, the Restraining Order should have issued on these grounds alone. *Coplon* v. *United States*, 191 F. 2d 749 (C.A. D.C. 1951), 89 U.S. App. D.C. 103 (Cert. Den.), 72 S. Ct. 363, 342 U.S. 926, 96 L. Ed. 690; *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C. 1953), U.S. App. D.C. 355.

As the Court said in *U. S.* v. *O'Connor*, 118 F. Supp. 248 (D.C. D. Mass. 1953):

> "So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestriced subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases. Cf.

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[4] "Some courts have failed to realize the great distinction between the function of an Internal Revenue Agent and a Special Agent. The Constitution gives the government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division. (26 CFR 601.105(b)).

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

—"Searches and Seizures"
by Joseph W. Burns,
20 Institute of Federal Taxation,
New York University 1081, 1087 (1962).

In re National Window Glass Workers, D.C. N.D. Ohio, 287 F. 219. Rules 17 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., has only the limited function of procuring production of papers for use in evidence at a trial. It is not the equivalent of pretrial discovery. Cf. Bowman Dairy Co. v. United States, 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879.

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652.

"To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Washington 5, D. C.

Dated: May 8, 1963.

APPENDIX A

Statutory Provisions Cited and Quoted

68A, Stat. 901; 26 USC § 7602
Sec. 7602, Internal Revenue Code of 1954:

> Sec. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevent to such inquiry.

68A, Stat. 902; 26 USC § 7604
Sec. 7604, Internal Revenue Code of 1954:

> Sec. 7604. (a) Jurisdiction of District Court.—If any person is summoned under the internal revenue

laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

APPENDIX B

Copies of Opinion, Judgment, Findings of Fact and Conclusions of Law, Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16690

SAMUEL REISMAN, ET AL., APPELLANTS

v.

MORTIMER M. CAPLIN, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided February 7, 1963

Messrs. Hans A. Nathan and *Warren E. Magee* for appellants.

Mr. Richard M. Roberts, Attorney, Department of Justice, for appellee Caplin. *Assistant Attorney General Oberdorfer, Messrs. Lee A. Jackson* and *Joseph M. Howard*, Attorneys, Department of Justice, were on the brief for appellee Caplin. *Mr. David C. Acheson*, United States Attorney, also entered an appearance for appellee Caplin.

Robert S. MacClure and *Edward H. Harney*, Co-partners, and all other Co-partners of *Robert S. MacClure*, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership) filed a brief pro se.

Before MR. JUSTICE BURTON, retired,* and FAHY and BURGER, *Circuit Judges.*

FAHY, *Circuit Judge*: This appeal is from an order of the District Court dismissing a complaint for a declaratory judgment and injunction against Mortimer M. Caplin, who is the Commissioner of Internal Revenue, and others, and denying plaintiffs' motion for a preliminary injunction. The plaintiffs are attorneys. They set forth in their complaint that they represent certain persons, (a man and his wife), to whom we shall refer as the taxpayers, in controversies of a substantial character which are pending in regard to income tax liabilities to the United States. As such attorneys, they further allege, they employed the services of a firm of expert accountants, Peat, Marwick, Mitchell and Company, particularly defendants MacClure and Harney of the firm, to assist in the preparation for trial of cases pending in the Tax Court against taxpayers, and also to enable plaintiffs better to advise taxpayers in connection with a criminal investigation the defendant Commissioner was threatening to institute. The Tax Court cases were set for October 1961. On June 30, 1961, the Commissioner caused to be served on the accountants at their offices in both Chicago and New York summonses issued by him under the purported authority of § 7602 of the Internal Revenue Code of 1954. The summonses call upon the accounts to give testimony relating to the tax liability of the husband taxpayer and/or certain businesses and to bring with them all books, documents and records in the custody or control of Peat, Marwick, Mitchell and Company which pertained to the taxpayer and other named entities.

Plaintiffs allege that the accountants advised them they would produce the requested documents, located in Chicago, New York or Los Angeles, so as not to risk contempt

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* Sitting by designation pursuant to Sec. 294(a) Title 28, U.S. Code.

proceedings for failure to do so. Plaintiffs further allege that to avoid premature disclosure of their defense strategy, reflected in the documents, with loss of ability effectively to assist taxpayers as counsel if their work product were prematurely disclosed to their opponents, they filed the complaint, joining the accountants as defendants.

The essence of the complaint is that the summonses called for the production of privileged matter, including the work product of counsel, and were not issued for the purpose of assessing taxes or of ascertaining the correctness of any return, but to obtain evidence for use in pending tax cases to prosecute taxpayers criminally.

Plaintiffs moved for a temporary restraining order to prevent the Commissioner from attempting to enforce the summonses directed to the accountants and to restrain the latter from turning over to the Commissioner any of the papers in their possession. The restraining order was issued. Motion for preliminary injunction was also made. The Commissioner opposed this and moved for dismissal of the complaint. The defendants Harney and MacClure, as representatives of the accounting firm, answered, admitting the essential allegations of the complaint and joining in its prayers for relief, which included a prayer that the summonses be quashed.

On the basis of the complaint, an affidavit of one of the plaintiffs in support of the motion for temporary restraining order and preliminary injunction, the answer of defendant accountants, and plaintiffs' answer to interrogatories, the District Court, after hearing argument, granted defendant Caplin's motion to dismiss, entering findings of fact and conclusions of law.[1] The court rejected plaintiffs' contentions that the corporate books, documents and records sought by the summonses constituted the work product of plaintiffs, holding that the work papers and

[1] By stipulation and order based thereon the Commissioner has refrained from enforcing the summonses pending this appeal.

audit reports prepared by the accounting firm were the work product of the accountants and not of plaintiffs. The court also held that the original books, documents, records, work papers and audit reports prepared by the accountants and listed in the summonses were not within the attorney-client privilege.

We think the complaint was properly dismissed, but for a different reason, namely, that it is not within the court's jurisdiction because it is in substance a suit against the United States to which it has not consented. In terms, as well as actually, it is against the Commissioner in his official capacity, seeking to bind him in that capacity, as well as his successors in office and his agents. The statute under which the summonses were issued is not claimed to be unconstitutional; and since the Commissioner has acted within authority delegated by the statute his action may not be considered personal. The suit accordingly seems to us to be an effort to restrain the United States, and therefore to fall within the sovereign immunity doctrine. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962). While those cases concerned suits over property, where it is more readily seen they were against the United States notwithstanding *United States* v. *Lee*, 106 U.S. 196 (1882), the immunity is not limited to cases involving property. It extends as well to those where the relief sought would "interfere with the public administration," as stated in *Land* v. *Dollar*, 330 U.S. 731 (1947), though that case itself did involve property, or where it appears that "by obtaining relief against the officer, relief" would, "in effect, be obtained against the sovereign." *Larson* v. *Domestic and Foreign Commerce Corp., supra* at 688. And see *Wells* v. *Roper*, 246 U.S. 335, 337 (1918); *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (1913).

The statute clearly authorizes summonses in the general terms of those before us to be issued by the Commissioner as the delegate of the Secretary of the Treasury. No

doubt there may arise circumstances where in enforcement proceedings[2] it may be found that summonses so issued seek documents which are privileged or otherwise unavailable to the Commissioner. But in this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, has successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

We are reminded of Mr. Justice Douglas' statement in his dissenting opinion in *Malone* v. *Bowdoin*, *supra* at 650, that "policy considerations, not always apparent on the surface, are powerful agents of decision" in sovereign immunity cases. Such considerations argue against a right in the plaintiffs to raise a barrier now against the governmental action of the Commissioner. Under section 7604(b) further proceedings are required before anyone can be compelled to produce the documents. During such pro-

[2] Section 7604(b) of the Internal Revenue Code of 1954 provides:

> Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data . . ., the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner . . . for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment . . . for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

ceedings legal objections and privileges can be interposed for judicial decision. It may then appear that some right or privilege asserted either by those summoned or those claiming through such persons would preclude the Commissioner from obtaining whatever compliance might be sought in the enforcement proceedings. But until these proceedings take form this cannot definitely be known. It would be incumbent upon the judge conducting the enforcement hearing to rule upon objections, taking evidence if necessary relating to various documents involved in order to separate the privileged from the non-privileged. We take it that such a hearing would be a necessary preliminary to citing a summoned party for contempt for failure to comply with a summons, and that a contempt order could not be summarily imposed. See, however, *Application of Colton*, 291 F.2d 487 (2d Cir. 1961).[3] We need not now consider what judicial response would be appropriate if enforcement were attempted under some other statute than Section 7604(b).[4]

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[3] And see *In re Turner*, 309 F. 2d 69 (2d Cir. 1962). Legislative history supports the view that in the enforcement hearing a person summoned should be heard on his claim of privilege before a contempt charge would lie. In the debates on the predecessor of Section 7604(b) this exchange occurred:

> Mr. Stevens. This provides expressly that on appearance the process and everything shall be open to answer.
>
> Mr. Ganson. Not before the attachment is issued.
>
> Mr. Stevens. The attachment is only to bring the party there, and then the answer is open. It will be simply one process instead of two, which will be a great saving in time and expense. It takes no privilege from the party. He is not to be punished until he is heard. This is to be done by the judge. . . .

Cong. Globe, 38th Cong., 1st Sess. 2997 (1864).

[4] The position of the Assistant United States Attorney on this appeal is that a criminal prosecution under Section 7210 of the Revenue Code, referred to in *Application of Colton*, *supra*, and by appellants in a memorandum filed after argument in response to inquiry by the court respecting this section, would not follow from a good faith refusal to comply with a revenue summons.

Finally it must be said that joinder of the private parties who are accountants cannot dictate a different result, that is, serve to vest jurisdiction in the District Court, for the true position of these parties is that of plaintiffs, although nominally they appear as defendants. They seek the same relief as their employer, the plaintiffs.

We conclude that the complaint was properly dismissed, but for the reasons expressed herein.

Affirmed.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellees Robert S. MacClure and Edward H. Harney, Co-partners, and all other co-partners of Robert S. MacClure, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership) recover from appellants the taxable costs of printing their brief on this appeal, and have execution therefor.

Per Circuit Judge FAHY.

Dated: February 7, 1963.

Samuel Reisman, and Charles M. Trammell, Bert B. Rand, Hans A. Nathan, d/b/a Trammell, Rand & Nathan, Plaintiffs v. Hon Mortimer M. Caplin, and Robert S. MacClure and Edward H. Harney, co-partners and all other co-partners of Robert S. MacClure, as a class, d/b/a Peat, Marwick, Mitchell & Co. (a co-partnership), Defendants.

U.S. District Court, Dist. of Col., Civil Action No. 2216-61, 9/13/61.

Filed Sept. 13, 1961 Harry M. Hull, Clerk

Findings of Fact and Conclusions of Law

This cause regularly came on for hearing on September 7, 1961, before the Honorable George L. Hart, United States District Judge, on the Motion to Dismiss Complaint for Injunction and Declaratory Relief of the defendant, Mortimer M. Caplin, Commissioner of Internal Revenue, and the Motion for Preliminary Injunction of the plaintiffs, Samuel Reisman and Charles M. Trammell, Bert B. Rand and Hans A. Nathan, d/b/a Trammell, Rand & Nathan. The plaintiffs appearing by their attorney, Warren E. Magee, and the defendant, Mortimer M. Caplin, Commissioner of Internal Revenue, appearing by his attorneys, Richard M. Roberts, John M. Burtio and Frank J. Violanti, Tax Division, Department of Justice, Washington, D. C., and the Court having considered the pleadings, the briefs, and the arguments of counsel, makes its findings of fact and conclusions of law as follows:

1. The plaintiff, Samuel Reisman, is a practicing attorney residing in Los Angeles, California. The plaintiffs, Charles M. Trammell, Bert B. Rand and Hans A. Nathan are practicing attorneys in the District of Columbia. Plaintiffs, Charles M. Trammell and Bert. B. Rand, reside in the District of Columbia. Plaintiff, Hans A. Nathan, resides in the State of Virginia.

2. The defendant, Mortimer M. Caplin, is the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury of the Unitel States of America.

3. The defendants, Robert S. MacClure and Edward H. Harney, are residents of the State of Illinois and are co-partners in the accounting firm of Peat, Marwick, Mitchell & Co.

4. Peat, Marwick, Mitchell & Co. a co-partnership, is an accounting firm composed of numerous certified public accountants and has offices in various states in the United States and abroad.

5. Sometime prior to January 1, 1950, the plaintiff, Samuel Reisman, was retained as counsel by Martin J. Bromley and his wife, Ally Bromley, of 4111 Japus Circle, Honolulu, Hawaii, to act as their legal adviser in connection with their liability for federal income taxes for years beginning with the year 1950 and in connection with other legal matters.

6. On or about April 20, 1960, the plaintiff, Samuel Reisman, associated himself with the plaintiffs, Charles M. Trammell, Bert. B. Rand and Hans A. Nathan, d/b/a Trammell, Rand & Nathan, to act as associate counsel in connection with the tax liability of Martin J. and Allyn Bromley, in particular to assist him in preparing for the trial of certain Tax Court cases involving Martin J. and Allyn Bromley presently pending as Docket Nos. 84961, 84962, 85106 and 87770 and for the purpose of advising Martin J. and Allyn Bromley generally with respect to their tax liability.

7. On or about April 25, 1960, plaintiffs hired the accounting firm of Peat, Marwick, Mitchell & Co., including the defendants Robert S. MacClure and Edward H. Harney, to examine the books of various enterprises in which Martin J. Bromley was engaged.

8. Peat, Marwick, Mitchell & Co. was paid for its services by the plaintiff, Samuel Reisman, who then in turn billed Martin J. and Allyn Bromley for said services as part of the plaintiffs' costs.

9. Subsequent to April 25, 1960, Peat, Marwick, Mitchell & Co. conducted an examination of the original books and records of numerous domestic and foreign corporations in which Martin J. Bromley was a stockholder, of the original books and records of certain domestic and foreign partnerships in which Martin J. Bromley was a partner, and of whatever original books and records Martin J. Bromley kept with respect to his individual enterprises. Some of the original books and records were transmitted to Peat,

Marwick, Mitchell & Co. from the plaintiffs to whom Martin J. Bromley had entrusted them. Some of the original books and records were examined by representatives of Peat, Marwick, Mitchell & Co. at the place where such records were kept, both abroad and in the United States.

10. Peat, Marwick, Mitchell & Co. during the course of its examination of the various original books and records prepared workpapers and audit reports.

11. On June 13, 1961, the defendant, Mortimer M. Caplin, through his various agents, caused to be issued and delivered to Peat, Marwick, Mitchell & Co. at its offices in Los Angeles, California, New York, New York and Chicago, Illinois, certain summonses, Treasury Department Form 2039 A, which called for the production of all books, documents and records in the custody or control of Peat, Marwick, Mitchell & Co., including workpapers and audit reports prepared by Peat, Marwick, Mitchell & Co. pertaining to certain domestic and foreign corporations and for the production of all audit reports, workpapers and correspondence in the custody or control of Peat, Marwick, Mitchell & Co. pertaining to certain domestic and foreign partnerships and Martin J. Bromley. Certain of the summonses were issued in connection with an investigation of the tax liability of Service Games, Inc.-Panama for the years 1953 through 1959. The other summonses were issued in connection with an investigation of the tax liability of Martin J. Bromley for the years 1957 through 1959.

12. The summonses involved seek only the production of books, documents and records, including audit reports and workpapers, in the custody or control of Peat, Marwick, Mitchell & Co. within the territorial limits of the United States of America.

13. All of the work done in the preparation of the workpapers and audit reports sought in the summonses was

done by various representatives of Peat, Marwick, Mitchell & Co.

14. All of the summonses involved were directed to Peat, Marwick, Mitchell & Co. and its representatives and require nothing of the plaintiffs.

15. On July 7, 1961, a temporary restraining order was issued by this Court, based upon the pleadings and affidavits filed by the plaintiff, restraining the defendant, Mortimer M. Caplin, from taking any further steps to enforce the summonses issued to Peat, Marwick, Mitchell & Co. and restraining Peat, Marwick, Mitchell & Co. and the defendants, Robert S. MacClure and Edward H. Harney, from complying with the summonses.

16. On September 7, 1961, this cause came on for hearing on the Motion to Dismiss Complaint for Injunction and Declaratory Relief of the defendant, Mortimer M. Caplin and the Motion for Preliminary Injunction of the plaintiff.

Conclusions of Law

1. The plaintiffs have no standing to sue.

2. The plaintiffs have failed to state a cause of action upon which relief can be granted.

3. The original books, documents and records of the various corporations listed in the summonses involved do not constitute the work product of the plaintiffs.

4. The workpapers and audit reports prepared by the accounting firm of Peat, Marwick, Mitchell & Co. constitute the work product of the accountants and not the work product of the plaintiffs.

5. The original books, documents and records and the workpapers and audit reports prepared by the accountants listed in the summonses involved do not fall within the attorney-client privilege.

6. There has been no showing that the plaintiffs would be likely to prevail if this action were tried and therefore the preliminary injunction should not issue.

/s/ GEORGE L. HART
United States District Judge

Dated this 13th Day of September, 1961

Filed Sept. 13, 1961

Stipulation

It is hereby stipulated and agreed by the parties hereto, through their respective attorneys, that:

1. The defendant Mortimer M. Chapin, Commissioner of Internal Revenue, and all of his agents, will refrain from taking any further steps to enforce the summonses involved in this action pending the final determination of this matter on appeal by the plaintiffs.

2. The plaintiffs will file immediately, and by no later than September 13, 1961, a Notice of Appeal, and will docket the appeal and file the record on appeal within 40 days after filing the Notice of Appeal.

3. All of the books, documents and records, including but not limited to the work papers and audit reports, listed in the summonses involved, and which were in the custody or control of the defendants, Robert S. MacClure and Edward H. Harney, and the accounting firm of Peat, Marwick, Mitchell & Co. on June 13, 1961, which still remain in their possession, custody or control, will remain in the custody and control of said persons pending the final determination of this matter on appeal and any of said books, documents and records which since June 13, 1961 have been turned over and delivered to the plaintiffs, will remain in the custody and control of the plaintiffs pending the final determination of this matter on appeal, and the plaintiffs and

the persons listed above having said custody and control will not remove such books, documents and records from the territorial limits of the United States.

WARREN E. MAGEE
Attorney for Plaintiffs

RICHARD M. ROBERTS
Attorney for Mortimer M. Caplin

B. W. COCHRANE
Representative of Robert S. MacClure and Edward H. Harney, Co-partners and all other co-partners of Peat, Marwick, Mitchell & Co., a co-partnership.

Filed Sept. 13, 1961

Order on Stipulation

UPON CONSIDERATION of the Stipulation of the parties filed in the above-entitled action on September 13, 1961, and, it appearing therefrom that the Defendant Mortimer M. Caplin, Commissioner of Internal Revenue, and all of his Agents will refrain from taking any further steps to enforce the Summonses involved in this action pending the final determination of this matter on Appeal, and that the remaining parties have agreed that all of the books, documents and records (including, but not limited to the work papers and audit reports) listed in the Summonses involved, will remain in their possession, custody and control pending the final determination of this matter on Appeal, and that the remaining parties have agreed that they will not remove such books, documents and records from the Territorial Limits of the United States pending the final determination of this matter on Appeal,

IT IS, by the Court, this 13th day of September, 1961,

ORDERED, that the Stipulation filed herein by the parties on September 13, 1961 be and the same hereby is approved; and

IT IS FURTHER ORDERED, that the parties to this action abide by the provisions of that Stipulation pending the final determination of this matter on Appeal, as provided in the Stipulation.

/s/ GEORGE S. HART, JR.
Judge

Filed March 18, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 16,690

SAMUEL REISMAN, ET AL., *Appellants,*

v.

MORTIMER M. CAPLIN, ET AL., *Appellees.*

Before: Mr. Justice Burton, sitting by designation, and Fahy and Burger, Circuit Judges.

Order

On consideration of appellants' motion for stay pending preparation of petition for certiorari, and of the opposition thereto of appellee Caplin, it is

ORDERED by the court that the motion is hereby denied.

Per Curiam.

Dated: March 18, 1963

APPENDIX C

Conflicting Opinions

PERRY A. DE MASTERS, Internal Revenue Agent, Internal Revenue Service, Arthur G. Erickson, District Director of Internal Revenue, Mortimer M. Caplin, Commissioner of Internal Revenue and The United States National Bank of Portland (Oregon), *Appellants*,

v.

EGON D. AREND and MELA K. AREND, *Appellees*.

No. 17796.

United States Court of Appeals
Ninth Circuit.

Jan. 24, 1963.

Rehearing Denied Feb. 26, 1963.

* * * * * * * * * * *

Before MERRILL, BROWNING and DUNIWAY, Circuit Judges.

BROWNING, Circuit Judge.

The District Court permanently enjoined appellants (employees of the Internal Revenue Service) from investigating possible income tax liability of appellee taxpayers for years as to which recovery would be barred by the statute of limitations in the absence of fraud. The Court also permanently enjoined the United States National Bank of Portland from disclosing to appellants any information regarding transactions by or with the taxpayers during such years. We reject appellants' contention that a District Court has no power to issue such a restraining order in any circumstances, but we conclude that the Court lacked power to do so in the circumstances of this case.

The taxpayers'[1] 1946 and 1948 income tax returns were audited and their records for those years examined during

[1] The taxpayers are husband and wife.

1948 and 1950. In 1957 appellant De Masters, an Internal Revenue agent, began a new investigation of the taxpayers' returns. It is stipulated that the period during which additional income tax could be assessed against taxpayers for any year prior to 1955 had expired, unless fraud were involved.[2] The taxpayers furnished De Masters with the information which he requested until he sought access to taxpayers' records without limitation as to date. Appellees' counsel then advised De Masters that in view of the prior audits and because the taxpayers were not charged with fraud they would not cooperate further in the investigation.

De Masters prepared tentative computations from various sources which indicated that the increase in the taxpayers' net worth, plus their estimated living expenses, during the period 1940 through 1956 totaled approximately $170,000. This increase, after appropriate adjustments, exceeded the income which the taxpayers reported during the same period for tax purposes by more than $90,000. He then examined records of a branch of the First National Bank of Portland reflecting deposits during 1948 to the account of taxpayers' shoe store, and found that they totaled some $17,000 more than the gross receipts reported on taxpayers' income tax return for that year.

De Masters concluded that further investigation was justified, and caused a summons to issue directing the United States National Bank of Portland to produce records pertaining to the taxpayers' transactions with the bank during the years 1940 to 1957. The taxpayers were advised that the bank would comply with the summons. They then filed the present suit for an injunction, naming the bank, the Commissioner of Internal Revenue, the District Director, and De Masters as defendants.

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[2] If a false or fraudulent return with intent to evade the tax, or a willful attempt in any manner to defeat or evade tax, is involved, the tax may be assessed at any time. 26 U.S.C.A. § 6501(c) (1) and (2).

The District Court held a hearing at which De Masters testified as to his computations and the results of his analysis of the taxpayers' 1948 deposits with the First National Bank of Portland. The Court concluded that the appellants had "failed to establish by competent evidence that there exists any reasonable grounds or other probable cause to find or suspect that any fraud existed with respect to any of the returns filed by the plaintiffs for the years that are now closed by the statute of limitations," and that the taxpayers were therefore entitled to an injunction. The Court permanently enjoined the appellants from examining the taxpayers or their records, or any third party as to transactions with the taxpayers, with respect to any year prior to 1955; and permanently enjoined the United States National Bank of Portland from disclosing any information as to transactions with the taxpayers prior to that year.

Appellants contend that (1) the District Court lacked jurisdiction of the action, (2) the suit was one against the United States to which consent had not been given and was therefore barred by the doctrine of sovereign immunity, and (3) the District Court's decision on the merits was erroneous.

I

[1] The taxpayers assert that their suit falls in the category of actions "arising under any Act of Congress providing for internal revenue" over which district courts are granted original jurisdiction by Section 1340 of the Judicial Code.[3] Concededly, appellants purported to act under

[3] "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." 28 U.S.C.A. § 1340.

the authority of Section 7602 of the Internal Revenue Code[4] • • • • • • • • • • • • in issuing the summons to the bank. The taxpayers challenged appellants' authority under that section on the ground that the inquiry was prohibited by Section 7605(b) of the Internal Revenue Code[5] as well as by the Fourth Amendment. Since the taxpayers' suit involved a substantial controversy as to the construction and effect of these sections of the Code, we agree with the District Court that if otherwise maintainable the action fell within the jurisdictional grant of Section 1340.[6]

II

[2, 3] Section 1340 is not a consent by the United States to suits against it.[7] However, if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlaw-

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[4] "For the purpose of • • • determining the liability of any person for any internal revenue tax • • • the Secretary or his delegate is authorized—

"(2) To summon • • • any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax • • • to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data • • • as may be relevant or material to such inquiry • • •." Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

[5] "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." Int. Rev. Code of 1954, § 7605(b), 26 U.S.C.A. § 7605(b).

[6] See United States v. Coson, 286 F. 2d 453, 456 (9th Cir., 1961).

[7] United States v. Coson, 286 F. 2d 453, 456 (9th Cir., 1961); First Nat'l Bank of Emlenton, Pa. v. United States, 265 F. 2d 297, 299 (3d Cir., 1959). Compare Application of Colton, 291 F. 2d 487, 489-490 (2d Cir., 1961), 75 Harv. L. Rev. 1222 (1962).

ful conduct would not be barred by the doctrine of sovereign immunity.[8]

A. *The Fourth Amendment*

[4, 5] Appellants' conduct did not violate the Fourth Amendment. They did not seek to compel production of the taxpayers' books and records, and if they had the Fourth Amendment would offer no basis for resisting that demand.[9] Assuming that an administrative subpoena directed to a corporation may constitute an "unreasonable search and seizure,"[10] the right violated would be that of the bank whose papers were demanded; but the bank waived any right it might have had to resist production, and the

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[8] Malone v. Bowdoin, 369 U.S. 643, 647-648, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 689-690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), and cases cited; California v. Rank, 293 F. 2d 340, 349-353 (9th Cir., 1961), cert. granted 370 U.S. 936, 82 S. Ct. 1586, 8 L. Ed. 2d 806 (1962). See Harmon v. Brucker, 355 U.S. 579, 581-582, 78 S. Ct. 433, 2 L. Ed. 2d 562 (1958); Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944); Colorado v. Toll, 268 U.S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927 (1925). See also Leedom v. Kyne, 358 U.S. 184, 190, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958); Application of Colton, 291 F. 2d 487, 489-490 (2d Cir., 1961), and cases cited, 75 Harv. L. Rev. 1222 (1962). See generally 75 Harv. L. Rev. 1479-93 (1962). We are also satisfied that this taxpayers' suit is neither one for declaratory judgment "with respect to federal taxes" precluded by 28 U.S.C. § 2201; nor an action "for the purpose of restraining the assessment or collection of any tax" precluded by 26 U.S.C.A. § 7421(a).

[9] See National Plate & Window Glass Co. v. United States, 254 F. 2d 92 (2d Cir., 1958); Bolich v. Rubel, 67 F. 2d 894 (2d Cir., 1933).

[10] Some doubt is suggested by Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 195, 66 S. Ct. 494, 90 L. Ed. 614 (1946), and First Nat'l Bank of Mobile, Ala. v. United States, 295 F. 142 (S.D. Ala. 1924), aff'd 267 U.S. 576, 45 S. Ct. 231, 69 L. Ed. 796 (1925). See also 69 Yale L.J. 131, 132-33 (1959).

taxpayers could not in any event assert the right on the bank's behalf.[11]

B. *Section 7605(b)*

Section 7605(b) contains two distinct prohibitions. The first is that "no taxpayer shall be subjected to unnecessary examination or investigations"; the second that "only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

1. Appellants neither violated the second prohibition nor, at the time of suit, threatened to do so.

[6] This prohibition applies by its express terms only to the *taxpayers'* records; it did not prevent the appellants

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[11] Foster v. United States, 265 F. 2d 183, 187-188 (2d Cir., 1959), and cases cited. The taxpayers rely upon Zimmermann v. Wilson, 81 F. 2d 847 (3d Cir., 1936), but the Court of Appeals for the Third Circuit modified its decision upon this point in a later opinion in the same case reported at 105 F. 2d 583, 586 (1939), stating, "[o]ur present view that a third party is not entitled to invoke the protection of the Fourth Amendment brings our decision in line with the overwhelming weight of authority." See 43 Va. L. Rev. 114 (1957). See also Baskerville v. United States, 227 F. 2d 454, 456 (10th Cir., 1955); United States v. Eversole, 209 F. 2d 766, 768 (7th Cir., 1954). See also United States v. White, 322 U.S. 694, 699, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944), and cases cited; Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943). Fourth Amendment rights do not depend upon nice distinctions of property law (cf. Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961), and cases cited), but the taxpayers had no interest in the bank's records of the kind the Fourth Amendment was intended to protect. Their interest was no different nor greater than that which they would have in denying appellants' access to documentary evidence belonging to, in the possession of, and to be produced by, any third person, which might contain information damaging to the taxpayers. Cf. Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

from seeking information from other sources, such as the bank, regarding the taxpayers' possible liability.[12] Indeed, the section anticipates that such inquiries will be made; as we read it, the section intends that the Commissioner of Internal Revenue (the Secretary's delegate) shall notify the taxpayer of an additional inspection of the taxpayer's books only "after investigation" from which the Commissioner concludes that "an additional inspection is necessary," and the preliminary investigation referred to must necessarily be an inquiry of sources other than the taxpayer.

There is nothing to indicate that appellants intended to seek a second inspection of the taxpayers' records for the years 1946 and 1948 unless, and until, the investigation of other sources required by Section 7605(b) had been completed, and had disclosed that an additional inspection of taxpayers' records was necessary. De Masters testified that the reason the taxpayers had not been notified of a second examination of their own records was that he had not completed the preliminary investigation required to sustain the notice. The threat that appellants would attempt a second examination of taxpayers' records without first satisfying the prerequisites of Section 7605(b) was at best remote and speculative.[13]

2. We turn finally to the provision of Section 7605(b) that "[n]o taxpayer shall be subjected to unnecessary examinations or investigations."

[7] The command is unequivocal. We have held that it constitutes "a limitation on the power" of the tax collect-

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[12] Application of Magnus, 299 F. 2d 335 (2d Cir., 1962); Foster v. United States, 265 F. 2d 183, 188 n. 3 (2d Cir., 1959); Hubner v. Tucker, 245 F. 2d 35, 39 (9th Cir., 1957).

[13] See Eccles v. Peoples Bank, 333 U.S. 426, 431, 68 S. Ct. 641, 92 L. Ed. 784 (1948).

ing authorities; appellants, in consequence, had "no power to make an unnecessary examination or investigation."[14] As we have said, if appellants violated this statutory limitation upon their power, the present suit is maintainable.[15] The difficult problem, of course, is that of determining the scope of the limitation: what is meant by an "unnecessary" investigation?

[8, 9] The Commissioner's statutory duty and power to inquire are stated in broad terms. He is directed to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax."[16] He is authorized to examine records and data and to require persons liable for tax and others to appear, give testimony,

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[14] Martin v. Chandis Securities Co., 128 F. 2d 731, 735-736 (9th Cir., 1942). We have been invited to re-examine Chandis in the light of Application of Magnus, 299 F. 2d 335, 337 (1962), in which the Court of Appeals for the Second Circuit recently held that the prohibition in Section 7605(b) against unnecessary investigations (as well as that against repeated inspections of taxpayer's books and records) applies only to inquiries made of the taxpayer personally, and does not extend to inquiries made of third persons even though concededly part of an investigation directed solely to the taxpayer's liability. As the Court in Magnus points out, inquiries of thir parties impose no burden upon the taxpayers, the third parties may have judicial protection from unwarranted and unreasonable search and seizure independently of Section 7605(b), and the government would not be barred from making inquiries which might throw light on the taxpayer's liability and enable the government to demonstrate that a direct examination of the taxpayer and his records is necessary. See also Foster v. United States, 265 F. 2d 183, 188 n. 3 (2d Cir., 1959). But see Colton v. United States, 306 F. 2d 633, 635-636 (2d Cir., 1962), petition for cert. denied 83 S. Ct. 505 (1962). However, the disposition which we make of the present case renders a re-examination of Chandis unnecessary.

[15] See note 8, supra.

[16] Int. Rev. Code of 1954, § 7601, 26 U.S.C.A. § 7601.

and produce records and data, relevant or material to an inquiry "for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability."[17]

These grants of power are to be liberally construed in recognition of the vital public purposes which they serve;[18] the exception stated in Section 7605(b) is not to be read so broadly as to defeat them.[19] A limited construction of Section 7605(b) is also supported by the law's general antipathy to the erection of barriers to the ascertainment of truth,[20] and the policy against judicial intervention in the investigative stage of tax matters because of the danger of undue delay in the collection of the revenues.[21]

[10, 11] An investigation cannot be said to be "unnecessary" if it may contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry. Since these include making a return where none has been made and ascertaining the correctness of any that have, the taxpayer[22] will rarely be

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[17] Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

[18] Falsone v. United States, 205 F. 2d 734, 742 (5th Cir., 1953).

[19] Application of United States, 246 F. 2d 762, 765 (2d Cir., 1957).

[20] Application of Magnus, 299 F. 2d 335, 337 (2d Cir., 1962); McMann v. SEC, 87 F. 2d 377, 109 A.L.R. 1445 (2d Cir., 1937).

[21] See Enochs v. Williams Packing Co., 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962); N.Y.U. 18th Annual Institute on Federal Taxation 958 (1960).

[22] Perhaps a third person might show that an investigation was unnecessary as to him because he had no material relating to the taxpayer's liability, but here the issue is more likely to arise in resisting enforcement of a summons and the ground for relief more likely to be stated in terms of the burdensomeness of the demand. See United States ex rel. Sathre v. Third Northwestern Nat'l Bank, 102 F. Supp. 879 (D. Minn. 1952); Foster v. United States, 265 F. 2d 183, 187 n. 2 (2d Cir., 1959); 60 Mich. L. Rev. 187, 204-05 (1961).

able to discharge his burden of showing that the first investigation of a particular tax year is unnecessary. The legislative history, though sparse, tends to confirm the impression that Congress was primarily concerned with protecting taxpayers from examinations which were "unnecessary" in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability.[22] As the Court of Appeals for the Sec-

[22] It may also be drawn from the remarks of sponsors of the provision that Congress anticipated that its purpose of ending such "frivolous" investigations would be accomplished primarily through administrative control resulting from the requirement that the Secretary notify the taxpayer in writing of the necessity for repeating the inquiry—although it should be added that there is nothing to indicate an intention to exclude judicial intervention if administrative control should fail. What is now Section 7605 (b) of Title 26 first appeared as Section 1308 of the Revenue Bill of 1921. In presenting the proposal to the House, Congressman Hawley, in charge of the measure, stated (61 Cong. Rec. 5202 (1921)):

"We had instances before us where the books of a corporation or an individual had been examined four or five times, with four or five different assessments of taxation. There ought to be one levy of tax, one determination of it. It ought to be settled once for all when a man pays his tax, unless there should be good cause for a re-examination.

* * * * *

"Of course the Commissioner would not cause a frivolous examination to be made or an examination to be made on a frivolous ground."

Similarly, Senator Penrose, in charge of the measure, advised the Senate (61 Cong. Rec. 5855 (1921)):

"[B]itter complaints have reached me and have reached the department of unnecessary visits and inquisitions after a thorough examination is supposed to have been had. This section is purely in the interest of quieting all this trouble and in the interest of the peace of mind of the honest taxpayer."

In the same passage, Senator Penrose agreed with the statement of Senator Walsh that the purpose of the Section as "to limit

ond Circuit has said, "The stricture against 'unnecessary' examinations was designed to prevent uselessly reptitive procedures and investigations not relevant to possible tax liability, not to nullify the preceding sections of the Code." [24]

[12-14] The investigative power granted administrative agencies is inquisitorial in nature; its exercise does not depend upon a showing of probable cause to believe that a violation of law has occurred.[25] This is true of the power of inquiry vested in the Commissioner.[26] Clearly, he may as a general rule check to determine whether a return should have been filed where one was not, or whether more tax was due than was actually paid, without first showing that there was probable cause, or any cause at all, to believe that these things were true. The Bureau of Internal Revenue, like other administrative agencies charged with enforcement of law, "can investigate merely on suspicion

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the inspection to one visit unless the Commissioner indicates that there is necessity for further examination."

The report of the Senate Committee (S. Rep. No. 275, 67th Cong., 1st Sess. 31 (1921)) states that the provision "is designed to meet the complaint of taxpayers that they are subjected to onerous and unnecessarily frequent examinations and investigations by revenue agents." H.R. Rep. No. 337, 67th Cong., 1st Sess. 16 (1921), is to the same effect.

[24] Application of the United States, 246 F. 2d 762, 765 (1957); 60 Mich. L. Rev. 187, 204-05 (1961).

[25] United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-216, 66 S. Ct. 494, 90 L. Ed. 614 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 63 S. Ct. 339, 87 L. Ed. 424 (1943); Hagen v. Porter, 156 F. 2d 362, 365 (9th Cir., 1946); 69 Yale L. J. 131, 133 (1959); 1 Davis, Administrative Law, § 3.12 (1958).

[26] Foster v. United States, 265 F. 2d 183, 186 (2d Cir., 1959), and cases cited.

that the law is being violated, or even just because it wants assurance that it is not." [27]

But the taxpayers assert that Section 7605(b) creates an exception to this rule where the Commissioner seeks to investigate a return for a tax year as to which, unless fraud is shown, the statute of limitations has barred additional assessment.[28] It is not apparent why this should be so.

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[27] United States v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

[28] The decisions of the Courts of Appeals establish no clear rule as to whether an additional showing is required of the government in these circumstances to obtain enforcement of a subpoena issued under Section 7602, and, if so, what that showing must be. *First:* The Court of Appeals for the First Circuit has most nearly approached a requirement that "probable cause" in the Fourth Amendment sense be shown (O'Connor v. O'Connell, 253 F. 2d 365, 369-370 (1958); Lash v. Nighosian, 273 F. 2d 185, 188-189 (1959)), and in so doing expressly disagrees with holdings of Courts of Appeals for the Second and Fifth Circuits (253 F. 2d at 370). However, the Court views the issue as one of fact as to which the Commissioner's determination is binding if supported "by witnesses whose testimony, although contradicted, was not so incredible as to be beyond reasonable belief" (273 F. 2d at 189). *Second:* The Court of Appeals for the Second Circuit appeared to adopt the rule that no showing need be made as to possible fraud: "Nor should [the Bureau] be required to prove the grounds of its belief prior to examination of the only records which provide the ultimate proof" (United States v. United Distillers Prods. Corp., 156 F. 2d 872, 874 (1946)); "The Commissioner is therefore entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred • • • the Commissioner • • • should not be required to prove grounds for belief that the liability was not time-barred" (Foster v. United States, 265 F. 2d 183, 187 (1959)). But the Court nonetheless treated the question as still open in Application of United States, 246 F. 2d 762, 765 (1957), and again in Application of Magnus, 299 F. 2d 335, 337 (1962). *Fourth:* The Court of Appeals for the Fourth Circuit noted the difference in view among the Courts of Appeals and found it unnecessary to resolve it, but took it to be admitted that "a bona fide suspicion of fraud justifies the investigation of the appropriate records." Wall v. Mitchell, 287 F. 2d 31 (1961). *Fifth:* The

[15] The Commissioner's power and duty to investigate for the purpose of "determining the liability of any person for any internal revenue tax" [29] surely includes liability which may be assessed on a finding of fraud. And even if no fraud exists, the investigation of barred years may be useful or even essential to establish a sound starting point for checking the accuracy of returns filed in years that re-

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Court of Appeals for the Fifth Circuit is usually cited as requiring no showing of facts justifying a suspicion of fraud on the basis of its cryptic opinion in Globe Constr. Co. v. Humphrey, 229 F. 2d 148 (1956). See, e. g., O'Connor v. O'Connell, supra, 253 F. 2d at 370. *Sixth:* The Sixth Circuit has held that an agent's testimony that he had concluded from his investigation that there was a strong suspicion of fraud was sufficient, and that "[t]he special agent was not obliged to disclose in detail the facts relative to his investigation and conclusion, nor was the District Court obliged to require proof of facts showing reasonable grounds to believe that the tax returns * * * were false or fraudulent." Peoples Deposit Bank & Trust Co. v. United States, 212 F. 2d 86, 87 (1954). In Corbin Deposit Bank v. United States, 244 F. 2d 177 (1957), the Court said, "[p]robable cause * * * was established by the testimony of an internal revenue agent who enumerated facts showing reasonable grounds for a suspicion of fraud," and the District Court properly excluded "evidence for the purpose of proving that the taxpayers in fact had filed honest returns." Finally, in Eberhart v. Broadrock Dev. Corp., 296 F. 2d 685, 687 (1961), the Court stated, "there was at least an inference that fraud extended into some of the previous years. In our judgment, this was sufficient to authorize the examinations." *Ninth:* The Court of Appeals for the Ninth Circuit in Martin v. Chandis Securities Co., 128 F. 2d 731, 735 (1942), acted upon an agreement of the parties that a showing was required "of probable cause, sometimes called reasonable ground for suspicion of fraud", but "without expressing any opinion as to the soundness thereof." In Boren v. Tucker, 239 F. 2d 767 (1956), we found the test assumed in Chandis to be satisfied by proof of a "possibility" of fraud, and expressed approval of Globe, supra, 229 F. 2d 148 (5th Cir.), and Peoples Deposit, supra, 212 F. 2d 86 (6th Cir.), both of which, as noted above, require no showing as to the likelihood of fraud. 239 F. 2d at 769-70, 773.

[29] Int. Rev. Code of 1954, § 7602, 26 U.S.C.A. § 7602.

main open.[30] If a preliminary showing of probable cause is not necessary before initiating investigations for other authorized purposes, how can it be required for these?

[16] The taxpayers suggest two reasons: a policy against the presumption of fraud; and a policy in favor of preserving the integrity of the statute of limitations. But it is not necessary to presume fraud to justify an investigation to determine whether it exists. The Commissioner's power to investigate particular returns for normal errors or omissions is not based upon a presumption that they will be found. And while the policy in favor of composing strife, reflected in the statute of limitations, is entitled to protection, so too is the Congressional policy that fraud affecting the revenue shall be exposed and penalized without regard to the elapse of time, especially in a tax system so largely based on self-assessment.

[17] We think the limitations imposed upon the Commissioner by the interdiction of "unnecessary" investigations are essentially the same as those which may preclude judicial enforcement of administrative subpoenas: "that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited * * * by forecasts of the probable result of the investigation.'"[31] These limitations are appropriate "to

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[30] Falsone v. United States, 205 F. 2d 734, 743 (5th Cir., 1953); Norda Essential Oil & Chem. Co. v. United States, 230 F. 2d 764, 765 (2d Cir., 1956). Appellants do not appear to rely upon this basis for now examining the barred years in the present case, apparently satisfied that the returns filed in the open years were accurate; they do argue, however, that the injunction should at least be modified so as not to preclude such an examination if evidence of deficiencies in the open years were later obtained.

[31] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216, 66 S. Ct. 494, 90 L. Ed. 614 (1946).

This does not mean that Section 7605 (b) adds nothing to the taxpayers' protection. Section 7605(b) permits a judicial testing of the basic legality of the administrative action at an earlier stage

secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. * * * They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examinations can be expensive * * * time consuming * * *. [and] * * * persecution when carried beyond reason"; but to bar investigation by the Commissioner because evidence of unlawful conduct is not yet available "would stop much if not all of investigation in the public interest at the threshold of inquiry and * * * render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him."[32]

[18] Of course, proof that the period for assessment absent fraud has expired is relevant to the question of whether an investigation is "unnecessary," just as it would be relevant to whether a court should enforce an administrative subpoena.

[19] The purposes for which the Commissioner is authorized to investigate would then be limited. If he asserted no purpose other than one which was then barred of accomplishment (or asserted a purpose not authorized by the statute),[33] the proposed investigation would be "unnecessary" under Section 7605(b) and might be enjoined,

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than might otherwise be possible, and it provides a novel check on repetitious investigations which, as we have seen (note 23), was apparently its principal purpose.

We are not here concerned with limitations based upon the breadth of the inquiry or the relevance to the inquiry of the material sought. 1 Davis, Administrative Law § 3.05 (1958).

[32] 327 U.S. at 213, 66 S. Ct. at 508, 90 L. Ed. 614.

[33] See Pacific Mills v. Kenefick, 99 F. 2d 188 (1st Cir., 1938),

just as an administrative subpoena issued by the Commissioner in such circumstances would be denied judicial enforcement as "in excess of his statutory authority."

[20] Even though the Commissioner asserted a purpose to investigate for fraud, or to confirm a deficiency in an open year, as he was authorized to do, the likelihood that the inquiry might be "unnecessary" or the issuance of a subpoena "arbitrary," would at least be enhanced by the relative infrequency with which either fraud, or the need for indirect verification of a deficiency, normally occurs. And if it appeared that the decision to investigate in aid of that purpose was in fact reached as a matter of rational judgment based on the circumstances of the particular case, then the investigation would not be an "unnecessary" one prohibited by Section 7605(b), just as the act of issuing an administrative subpoena in such circumstances would not be "arbitrary" and the subpoena unenforceable.

This limited extension of the area of proper judicial intervention in the process of administrative investigation is justified by a significant change in the relevant balance of public and private interests which takes place with the running of the statute of limitations. The government's need for speedy and unimpeded access to the facts is diminished when the problem shifts from that of checking the accuracy of the returns of sixty million taxpayers within the relatively short period of limitations, to that of ferreting out the rare instance of liability for fraud which can never be barred by the passage of time. From the taxpayer's point of view, an inquiry which can be readily met when memories are clear and records readily available, may become difficult to satisfy with a lapse of time, possibly extending, as in this case, to a score or more of years.

[21] The showing by the taxpayers in the present case that further assessment was time-barred in the absence of fraud may have been sufficient to require the appellants to go forward with a justification of their inquiry. But this

they did, and the showing which they made was sufficient to establish (1) that further investigation was undertaken pursuant to the Commissioner's authority, and (2) that the decision to proceed was not arbitrary. No more was required.

Reversed.

Application of EDWARD E. COLTON and LILLIAN KALTMAN, *Appellants*,

To Quash a Summons to Appear to Testify and to Produce Books, etc., relating to the Tax Liability of HERBERT MATTER and MERCEDES MATTER.

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT, *Appellee*.

Docket 26939.

United States Court of Appeals
Second Circuit.

Argued June 5, 1961.

Decided June 21, 1961.

Motion to vacate a summons issued by a special agent of the Internal Revenue Service pursuant to statute. The United States District Court for the Southern District of New York, Archie Owen Dawson, J., denied the motion and an appeal was taken. On a motion to dismiss the appeal, the Court of Appeals, Friendly, Circuit Judge, held that the District Court had jurisdiction of the motion to vacate the summons and that the order of denial was appealable.

Motion to dismiss denied.

* * * * * * * * * * *

Before LUMBARD, Chief Judge, and GOODRICH* and FRIENDLY, Circuit Judges.

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* Of the Third Circuit, sitting by designation.

FRIENDLY, Circuit Judge.

Edward E. Colton and Lillian Kaltman, members of the bar of the State of New York, obtained an order, in the District Court for the Southern District of New York, requiring the Internal Revenue Service to show cause why two summons dated July 29, 1960, requiring them to appear before a special agent to give testimony and produce "Retained copies of income tax returns, workpapers, correspondence file, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of" their clients, Herbert and Mercedes Matter, from 1951 through 1958, should not be quashed or modified. There were several adjournments, during which movants appeared before the special agent without prejudice to their pending motion, and gave such testimony, relatively small in scope, as they considered not to violate the attorney-client privilege. On February 28, 1961, Judge Dawson denied the motion to quash or modify and vacated the stay previously issued. Colton was then served with another summons. On March 24, 1961, he appeared before the agent and again raised the attorney-client privilege. At the same time, an appeal from Judge Dawson's order of denial was taken to this Court. The Internal Revenue Service moves to dismiss the appeal for lack of appellate jurisdiction and mootness; it also challenges the jurisdiction of the District Court.

Section 7602(2) of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury or his delegate to summon either the person liable for tax or anyone else to appear at a time and place named in the summons and "to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material" to any pending inquiry as to non-compliance with the tax laws. Section 7603, 26 U.S.C.A. § 7603, tells how such a summons shall be served. Section 7604(a), 26 U.S.C.A. § 7604(a), endows the United States district court for the district in which any person summoned re-

sides or is found with "jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data." Section 7604(b) provides that when any person so summoned "neglects or refuses to obey such summons, or to produce such books, papers, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for contempt"; after hearing, the judge or the commissioner "shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to * * * the summons and to punish such person for his default or disobedience." Finally, Section 7210, 26 U.S.C.A. § 7210, provides that any person who, being duly summoned "as required under sections * * * 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution."

[1] These statutes appear to be much more drastic than the usual provisions as to subpoenas by administrative agencies. As we read them, resort by the Government to the district court under § 7604(a), 26 U.S.C.A. § 7604(a), is permissive only; this is in no way a condition to any other action. It is not entirely clear whether, under § 7604(b), the judge or the commissioner might, if he so chose, punish for contempt without giving the witness an opportunity to answer or, as was intimated in Brody v. United States, 1 Cir., 1957, 243 F. 2d 378, 381, certiorari denied 1957, 354 U.S. 923, 77 S. Ct. 1384, 1 L.Ed. 2d 1438, the proceeding is only one "to obtain the assistance of the court in forcing [the witness] to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of

which would be a contempt punishable by the court." In any event it is plain that the criminal penalty of § 7210 is not contingent upon prior action under either § 7604(a) or § 7604(b); that is what the words say and we so applied them in United States v. Becker, 2 Cir., 1958, 259 F. 2d 869, certiorari denied 1959, 358 U.S. 929, 79 S. Ct. 317, 3 L. Ed. 2d 303, as the record in that case shows, see also Chief Judge Magruder's statement in Brody v. United States, supra.

Neither the Internal Revenue Code nor any other statute contains specific provision for a motion by a person receiving a summons under § 7602, 26 U.S.C.A. § 7602, to vacate or modify it. Petitioners have cited a number of instances where motions to that end have been entertained in this Circuit, apparently without objection from the Government, some of which have reached this Court: International Commodities Corp. v. Internal Revenue Service, 2 Cir., 1955, 224 F. 2d 882; First National City Bank of New York v. Internal Revenue Service, 2 Cir., 1959, 271 F. 2d 616, certiorari denied 1960, 361 U.S. 948, 80 S. Ct. 402, 4 L.Ed. 2d 381; Application of Daniels, D.C.S.D.N.Y. 1956, 140 F. Supp. 322; Application of Burr, D.C.S.D.N.Y. 1959, 171 F. Supp. 448. Despite this the Service now says that the District Court lacks jurisdiction over such a motion, which the Service claims to be a suit against the Government without its consent, appellants, sustaining jurisdiction under 28 U.S.C. § 1340, and relying on Arend v. De Masters, D.C.D.Or. 1960, 181 F. Supp. 761, suggest we postpone determination of that issue to the argument of the appeal. We think the question so closely related to that of our appellate jurisdiction that we had best decide it now.

[2] If the statutory scheme were like that for enforcement of subpoenas of such agencies as the Interstate Commerce Commission, 49 U.S.C.A. § 12, or the Civil Aeronautics Board, 49 U.S.C.A. § 1484, there would be merit in the Government's position that courts ought not intervene

at so early a stage; since disobedience to a subpoena under those statutes has no penal consequences until a judge has ordered its enforcement, there is no occasion for any preliminary resort to the courts. Here, however, at least the criminal penalty of § 7210 is incurred by disobedience, and it is not altogether plain that a contempt citation under § 7604(b) may not be. Under such circumstances the principle of Ex parte Young, 1908, 209 U.S. 123, 147, 28 S. Ct. 441, 52 L. Ed. 714, and Oklahoma Operating Co. v. Love, 1920, 252 331, 336-337, 40 S. Ct. 338, 64 L. Ed. 596, comes into play; we see no reason why that principle should not be applicable to a summons, disobedience of which carries criminal penalties. We note that the dismissal of the bill in F. T. C. v. Claire Furnace Co., 1927, 274 U.S. 160, 47 S. Ct. 553, 71 L. Ed. 978, was for supposed lack of equity rather than because of sovereign immunity, and that the Supreme Court, more recently, has expressly declined to rule that reporting orders under § 6 of the Federal Trade Commission Act, 15 U.S.C.A. § 46, are "exempt from judicial examination," United States v. Morton Salt Co., 1950, 338 U.S. 632, 654, 70 S. Ct. 357, 370, 94 L. Ed. 401, although no method for such examination save a suit against government officers would seem available. See United States v. St. Regis Paper Co., 2 Cir., 1960, 285 F. 2d 607, 615-616, certiorari granted 1961, 365 U.S. 857, 81 S. Ct. 825, 5 L. Ed. 2d 822. We are not unmindful of the potentialities of delay inherent in such an extra round—potentialities sufficiently serious without one, as illustrated, for example, by Penfield Co. of Cal. v. S. E. C., 1947, 330 U.S. 585, 67 S. Ct. 918, 91 L. Ed. 1117; but the Government seems to be a victim of its own Draconianism. We hold the District Court had jurisdiction of the motion and thus reach the question of our appellate jurisdiction to review its denial.

[3] In support of its contention that the order denying the motion to quash or modify the summons was interlocutory and not appealable, appellee places primary reliance on Cobbledick v. United States, 1940, 309 U.S. 323, 60 S. Ct.

540, 84 L. Ed. 783, which held that an order denying a motion to quash a subpoena *duces tecum* to appear before a grand jury was not a final judgment within the predecessor of 28 U.S.C. § 1291. However, the Supreme Court there reaffirmed I. C. C. v. Brimson, 1894, 154 U.S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047, Harriman v. I. C. C., 1908, 211 U.S. 407, 29 S. Ct. 115, 53 L. Ed. 253, and Ellis v. I. C. C., 1911, 237 U.S. 434, 35 S. Ct. 645, 59 L. Ed. 1036, upholding the appealability of orders of district courts directing witnesses to answer in proceedings to compel testimony under § 12 of the Interstate Commerce Act,[1] and distinguished those decisions both from the case before it and from Alexander. v. United States, 1908, 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686, which had held that an order requiring a witness, not a party, to appear in a pending action was not final and appealable, on the ground, 309 U.S. at page 330, 60 S. Ct. at page 543, that "The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under § 12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience."

Applying that distinction, we have held that an order under § 7404(a), 26 U.S.C.A. § 7404(a), directing a person to testify is final and appealable, under 28 U.S.C. § 1291; In re Albert Lindley Lee Memorial Hospital, 2 Cir., 1953, 209 F. 2d 122, certiorari denied sub nom. Cincotta v. United States, 1954, 347 U.S. 960, 74 S. Ct. 709, 98 L. Ed. 1104, following Falsone v. United States, 5 Cir., 1953, 205 F. 2d 734, certiorari denied 1953, 346 U.S. 864, 74 S. Ct. 103, 98 L. Ed. 375, accord, O'Connor v. O'Connell, 1 Cir., 1958, 253 F. 2d 365, thereby necessarily joining the Fifth Circuit in its expressed disagreement with Jarecki v. Whetstone, 7 Cir., 1951, 192 F. 2d 121, which the Government nevertheless urges upon us here. See First National Bank of Mo-

[1] The Harriman case included a cross-appeal by the Commission from a denial of an order as to two questions.

bile, Ala. v. United States, 1925, 267 U.S. 576, 45 S. Ct. 231, 69 L. Ed. 796. However, that does not completely settle that an order denying relief in a proceeding instituted by the witness is similarly final and appealable. We held that it was in International Commodities Corp. v. Internal Revenue Service, 2 Cir., 1955, 224 F. 2d 882. Cf. Goldfine v. Pastore, 1 Cir., 1958, 261 F. 2d 519. Also in In re National Public Utility Investing Corp., 2 Cir., 1935, 79 F. 2d 302; United States v. United Distillers Products Corp., 2 Cir., 1946, 156 F. 2d 872; Norda Essential Oil & Chemical Co. v. United States, 2 Cir., 1956, 230 F. 2d 764, certiorari denied 1956, 351 U.S. 964, 76 S. Ct. 1028, 100 L. Ed. 1484; and Application of United States, 2 Cir., 1957, 246 F. 2d 762, certiorari denied Carroll v. United States, 1957, 355 U.S. 857, 78 S. Ct. 85, 2 L. Ed. 2d 64, we entertained appeals from denials of motions to vacate orders which the Government had obtained ex parte under § 7604(a). In First National City Bank of New York v. Internal Revenue Service, 2 Cir., 1959, 271 F. 2d 616, certiorari denied 1960, 361 U.S. 948, 80 S. Ct. 402, 4 L. Ed. 2d 381, we took jurisdiction over an appeal by the Service from an order granting a witness' motion to modify a summons in such a proceeding. The Government now contends, however, that a subsequent unreported memorandum decision, dated March 31, 1960, in that same proceeding, dismissing an appeal by the bank, is contrary to the International Commodities decision and must be deemed to have overruled it.

We think the International Commodities decision was right and should be followed. The purpose of a motion to modify or vacate the summons is to obtain an advance judicial determination of the validity of the summons and thereby obviate the unpleasant consequences which § 7210 and perhaps § 7604(b) visit upon disobedience. What is called the denial of a motion is, therefore, in effect the dismissal of a complaint. Cf. Perlman v. United States, 1918, 247 U.S. 7, 38 S. Ct. 417, 62 L. Ed. 950; Essgee Co. of China v. United States, 1923, 262 U.S. 151, 43 S. Ct. 514, 67 L. Ed. 917; Go-Bart Importing Co. v. United States, 1931, 282 U.S.

344, 51 S. Ct. 153, 75 L. Ed. 374; Russo v. United States, 2 Cir., 1957, 241 F. 2d 285, certiorari denied 1957, 355 U.S. 816, 78 S. Ct. 18, 2 L. Ed. 2d 33, and contrast Cogen v. United States, 1929, 278 U.S. 221, 49 S. Ct. 118, 73 L. Ed. 275. The memorandum decision in the later First National City Bank case, relied on by the Government, is entirely reconcilable with this view. The appeal there was from the denial of a second motion to vacate the summons, made by the bank after remand, wherein it proposed to supply the deficiencies in its proof of violation of Panamanian law which had led this Court, on the first appeal, to reverse the District Court's modification of the summons "with a direction to reinstate the subpoena as it originally issued and in the event of non-compliance to explore in contempt proceedings under 26 U.S.C. § 7604 the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law," 271 F. 2d at page 620. The District Court held the attempted second bite at the cherry by a further motion to be inconsistent with our mandate. We read the memorandum decision's statement that "there has not as yet been a final order below from which an appeal may be taken" as meaning that under the particular circumstances of that case there would be no appealable order until the path marked out by this Court's mandate had been followed to the end; we do not believe the panel meant to overrule, without discussion, the Court's explicit decision in International Commodities, which had not even been cited to it.

[4] There is no merit to the Government's claim that the appeal is moot, at least as to appellant Colton. There has been no disclaimer by the Service of its intention to require Colton to appear and produce books and records which he considers himself forbidden to do by the attorney-client privilege. The Government cannot render a case of this sort moot simply by substituting a new summons for an old one. Yarnell v. Hillsborough Packing Co., 5 Cir., 1934, 70 F. 2d 435, 438, 92 A.L.R. 1475.

Motion to dismiss appeal denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1084

SAMUEL REISMAN, ET AL., PETITIONERS

v.

HON. MORTIMER M. CAPLIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT CAPLIN IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. 10a–14a) and the opinion of the court of appeals (Pet. 3a–9a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1963 (Pet. 9a). The petition for a writ of certiorari was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' complaint, which asked for an order quashing an Internal Revenue Service summons and enjoining the Commissioner of Internal Revenue from attempting to enforce the summons by court action, constituted a suit against the United States to which the United States has not consented.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce

such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

Petitioners instituted the present action on July 7, 1961, by filing a complaint in the District Court for the District of Columbia asking declaratory and injunctive relief against respondent Caplin, the Commissioner of Internal Revenue (R. 2–16).[1] The allegations of the complaint and an accompanying affidavit may be summarized as follows:

In April 1960 petitioner Reisman, an attorney who has represented a taxpayer named Bromley for over ten years, associated the other three petitioners with him as associate counsel in connection with Bromley's tax liabilities (R. 2–5): In preparing for the trial of cases pending in the Tax Court involving Bromley's liabilities for the years 1953 to 1956, and also in view of possible criminal prosecution, petitioners decided they needed skilled accounting advice and engaged respondent Peat, Marwick, Mitchell & Co., which has offices in Chicago, Los Angeles, and New York (R. 3, 5). Thereafter Peat, Marwick, under the supervision of petitioners, analyzed the original records of Bromley and his numerous corporations, and kept all pertinent material segregated and labeled as the property of petitioners (R. 5–6, 44–46). There was a

[1] "R." refers to the joint appendix in the court of appeals.

tentative agreement to make some of this material available to the Internal Revenue Service for the purpose of settling the Tax Court cases, but when Bromley was warned by the Service that a criminal investigation was pending he refused to allow anything to be turned over (R. 6–7, 46). On June 13, 1961, respondent Caplin caused summonses to be served on Peat, Marwick, directing the firm to produce audit reports and work papers relative to Bromley's taxes for the years 1957 to 1959, and to produce all books and records of the numerous corporations for the years 1953 to 1959 (R. 7–8, 19–40).

Petitioners alleged in their complaint that enforcement of the summonses would violate the constitutional rights of their client, Bromley, in that it would be an unreasonable seizure, could force him to incriminate himself, and would deprive him of due process by revealing to the government the preparations his counsel had made for the Tax Court cases (R. 8–10, 46). The complaint prayed that respondent Caplin, "his successors in office and each of his or their officers, agents, assistants and employees, including (but not limited to), Revenue Agents and Special Agents throughout the United States and abroad, and all attorneys and anyone associated with or acting in concert or participating with him, and his successors in office," be enjoined from seeking enforcement of the summonses by court action (R. 14–15).

The district court dismissed the complaint, holding that petitioners had no standing to sue, that the

records were the work product of Peat, Marwick rather than of petitioners, and that production of the records sought would not violate the attorney-client privilege (Pet. 13a). The court of appeals affirmed the dismissal of the complaint on a different ground. After noting that the complaint was against the Commissioner of Internal Revenue in his official capacity (Pet. 6a), the court held that the suit was in substance one against the United States to which it had not consented, and was therefore prohibited under the doctrine of sovereign immunity (Pet. 6a–7a). While recognizing the right to sue an officer of the United States as an individual where the acts complained of are beyond the scope of his authority, the court held that Section 7602 of the Internal Revenue Code, pursuant to which the instant summonses were issued, "clearly authorizes" the Commissioner to proceed as he did in this case (Pet. 6a). The court therefore concluded (Pet. 7a):

> [I]n this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, his successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

ARGUMENT

The court of appeals held that petitioners' action was barred by sovereign immunity. This holding admittedly raises questions of some difficulty.[2] However, these questions need not, and should not, be decided in this case since petitioners' action is plainly without merit on other grounds.

Petitioners contended in their complaint that the Commissioner cannot compel production of the records and work papers on a series of grounds. They contend that enforcement would constitute an unreasonable search and seizure in violation of the Fourth Amendment (R. 8, 9–10); would require Bromley to incriminate himself in violation of the self-incrimination clause of the Fifth Amendment (R. 8); and would violate the due process clause of the Fifth Amendment because they were the work papers of Bromley's attorneys and accountants (R. 9).[3] All of

[2] The Ninth Circuit in *De Masters* v. *Arend*, 313 F. 2d 79 (Pet. 17a–33a), has suggested in dictum that sovereign immunity does not apply to suits where the taxpayer alleges that the summons was without statutory authorization or was unconstitutional. The Second Circuit has held in *Application of Colton*, 291 F. 2d 487 (Pet. 33a–40a), that sovereign immunity does not apply in cases involving actions to quash the summons brought by a recipient of the summons since refusal to obey would subject that person to criminal penalties under Sections 7210 and perhaps 7604(b) of the Code. This decision is not relevant here, however, since petitioners did not receive the summonses and therefore can not possibly be subjected to any criminal penalties.

[3] Petitioners also complained that the summonses violated various treaties and were invalid because they were directed to partnerships rather than individuals (R. 9). These contentions, however, have been abandoned on appeal and are not raised in the petition for certiorari.

these contentions involve the constitutional rights of Bromley or possibly of his accountants, but not of his attorneys. The alleged unreasonable search and seizure could violate at most only the privacy and security of Bromley and the accountants to whom the papers belong. It is only Bromley who could be incriminated. And the allegation as to the work papers of the accountants is that Bromley's right to the effective assistance of counsel will be violated if the Internal Revenue Service obtained the work product of his counsel. Since it is well established that a person cannot raise the rights of other individuals under the Fourth and Fifth Amendments, petitioners' contentions are clearly erroneous. *E.g., Goldstein* v. *United States,* 316 U.S. 114, 121; *Rogers* v. *United States,* 340 U.S. 367, 370–371.[4]

Petitioners now raise arguments: that the summonses violated Section 7602 of the Code, *supra,* pp. 2–3, because they were designed to obtain evidence in pending Tax Court cases and a possible criminal prosecution (Pet. 7–8) and that they interfered with the attorney-client privilege (Pet. 9–10). Since these contentions were raised for the first time on appeal,

[4] Petitioners say (Pet. 7) that their complaint alleged that Commissioner Caplin had exceeded his statutory powers by issuing the summonses "for the sole purposes" of obtaining the results of their preparation for the trial of the Tax Court cases and of obtaining evidence to be used in a criminal case against Bromley. But the complaint in fact contained no allegation that these were the "sole purposes" for the issuance of the summonses. Moreover, the facts stated in the complaint suggest the contrary. The Tax Court cases involve Bromley's individual liabilities for 1953 to 1956 (R. 5, 17), whereas the summonses had to do with Bromley's liabilities for 1957 to 1959 and corporate liabilities for 1953 to 1959 (R. 19–40).

they are not properly before this Court. Moreover, petitioners cannot bring an action to enforce the attorney-client privilege since the privilege belongs primarily to the client. See Wigmore, *Evidence* (3d ed.), § 2321. While an attorney can, and indeed must, invoke it in defense when a demand is made on him, the responsibility is on the client to raise the privilege when a demand is made on others. At least this is true when, as appears here, the client is available and can easily bring an action if he desires, against the accountants.

Petitioners' contention that the summonses were invalid as not authorized by the Code is likewise without merit. Petitioners do have the authority to raise this issue since, if the summonses were unauthorized, the Commissioner had no right to make the demand on the accountants. This means that petitioners, as the bailees of Bromley's records, are entitled to the records vis-a-vis an interloper attempting to obtain the records from a sub-bailee. However, even if petitioners may properly raise these issues, their contention are without merit. It is not an excess of

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[6] Petitioners' other contentions (which we discussed above), even if correct, would not make the summonses invalid. Bromley's constitutional rights and his rights to the protection of the attorney-client privilege and of the work product of his accountants are not infringed by the issuance of the summonses. Such rights can only be violated if the summonses are enforced or a person is convicted for refusal to comply with them, despite the invocation of these rights. If Bromley decided not to claim his constitutional rights or privileges, the summonses would have to be obeyed.

authority to issue a summons merely because the information obtained could be used in some future criminal proceeding. *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 14–17 (C.A. 2), certiorari denied, April 29, 1963; *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904; *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).[6] The Commissioner is likewise entitled to issue summonses to obtain information for use in pending Tax Court cases. *Norda Essential Oil & Chemical Co.* v. *United States*, 253 F. 2d 700 (C.A. 2); *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2). Furthermore, since the Tax Court cases have now been tried and are awaiting decision,[7] there is no longer any reason for interfering with enforcement of the summonses because of the pendency of those cases. In short, it is clear that the Commissioner did not exceed his statutory authority.[8]

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[6] *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), upon which petitioners rely (Pet. 11–12), is inapposite, for there the government admitted that the sole purpose of the summons was to support a criminal prosecution in which an indictment had already been returned. See *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).

[7] See Application for Stay of Mandate of Court of Appeals (p. 8), filed in this Court on March 20, 1963, and denied by the Chief Justice on March 23, 1963.

[8] Apart from the contentions made above and from the holding of the court of appeals, the government submits that petitioners' complaint was also barred because (1) Congress has provided that the exclusive remedy for resisting summons is to refuse to obey them and then resist criminal prosecution or enforcement of the summons under Sections 7210 and 7604 of the Code; and (2) petitioners' various claims, as the district court held (Pet. 13a), are without substance on their merits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners*,

v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & Co. (a co-partnership), *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners,*

v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & Co. (a co-partnership), *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (R. 156 to 161) is reported at 317 F. 2d 123. The Findings of Fact, Conclusions of Law, and Order of Dismissal by the United States District Court for the District of Columbia (R. 145 to 150) are reported at 61-2 USTC ¶ 9673.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 7, 1963 (R. 162). Petition for Writ of Certiorari was timely filed, and was granted on June 17, 1963 (R. 163). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether a suit to restrain the Commissioner of Internal Revenue from enforcing a subpoena issued under color of Section 7602 of the Internal Revenue Code of 1954 is barred by the Sovereign Immunity Doctrine where enforcement of such subpoena is alleged to be in violation of the Fourth, Fifth and Sixth Amendments to the Constitution and outside the Commissioner's statutory authority.

2. The second question presented is whether a taxpayer may be deprived of the effective assistance of Counsel by Respondent-Commissioner's forcing Counsel to reveal to him their entire trial preparation in advance of trial.

3. The third question presented is whether the attorney-client privilege against disclosure by an attorney of confidential communications between him and his client, extends to non-lawyer accountants and clerks, employed by the attorney.

4. The fourth question presented is whether an attorney who has hired a Certified Public Accountant (1) to assist him in preparation for trial, and (2) to enable him to give legal advice to a taxpayer-client with regard to pending criminal investigation against the taxpayer, has "standing to sue" in order:

(a) to protect his client against violation of the client's privilege against self-incrimination and of the attorney-client privilege;

(b) to protect his own ability to fulfill his duty as an officer of the Court and attorney-at-law;

(c) to protect against appropriation by opposing Counsel of the attorney's property rights in his work-product.

STATUTE INVOLVED

The statutory provisions involved are Sections 7602 and 7604 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, 7604, reading as follows:

68A, Stat. 901; 26 USC § 7602
Sec. 7602, Internal Revenue Code of 1954:

Sec. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

68A, Stat. 902; 26 USC § 7604

Sec. 7604, Internal Revenue Code of 1954:

> Sec. 7604. (a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

STATEMENT

Petitioners are attorneys. Respondent Mortimer M. Caplin is the Commissioner of Internal Revenue and respondents Peat, Marwick, Mitchell & Co. are Certified Public Accountants. The accountants were employed by the attorney-petitioners for the specific purpose of assisting them in connection with certain civil and criminal proceedings arising from an alleged large tax liability of two United States citizens, husband and wife, involving a multitude of individual commercial and financial transactions.

On June 30, 1961, respondent-Commissioner, under color of Section 7602 of the Internal Revenue Code of 1954, issued subpoenas to three branches of the world-wide respondent-accounting firm (in Los Angeles, Chicago and New York), requiring the accountants to testify before a Special Agent of respondent-Commissioner on the work performed in the employment of petitioner-attorneys, and to produce all documents, work papers and other material in their possession.

Respondent-accountants advised petitioner-attorneys that they intended to comply with the subpoena in every respect. (R. 10, 46)

At the time of service of the subpoenas four civil tax cases contesting deficiencies in income tax—determined by respondent-Commissioner more than a year earlier—were set down for trial in the Tax Court to begin October 1961. Criminal investigation was then (and still is) being carried on by respondent. (R. 46)

Neither attorney-petitioners nor respondent-accountants had taken any part in preparing any tax returns for, or in giving accounting advice to, the taxpayers. (R. 45) Their engagement was concerned solely with the defense of the pending civil and criminal litigation. (R. 18, 45)

To avoid disclosure and unlawful appropriation of their work-product and trial preparation by their opponent, and to prevent the unconstitutional seizure without warrant of confidential and privileged documents for future use as evidence in criminal proceedings, petitioners, upon a sworn complaint and supporting affidavit alleging the unlawfulness and unconstitutionality of the Commissioner's action (R. 2 *sequ.*), moved for and obtained a temporary Restraining Order in the United States District Court for the District of Columbia. (R. 41, 53) Several weeks later (but still prior to trial in the Tax Court), another judge of the same court dissolved the Restraining Order.

granted the Commissioner's motion to dismiss (which motion was unsupported by any affidavit or evidence) (R. 71) and held, as a matter of law, that petitioners had no "standing to sue". (R. 149)

The Court of Appeals for the District of Columbia Circuit affirmed the Judgment of the District Court, holding that the Complaint was properly dismissed, but for different reasons than those relied on by the District Court, namely, that:

> . . . it is not within the Court's jurisdiction because it is, in substance, a suit against the United States to which it has not consented.
>
> 312 F. 2d at p. 125. (R. 158)

This Court granted certiorari. 83 S. Ct. 1873 (R. 163)

SUMMARY OF ARGUMENT

Contrary to the holding of the Court of Appeals for the District of Columbia Circuit, the decisions by this Court in *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980, and *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, do not bar this suit to restrain the enforcement of a Sec. 7602 Internal Revenue subpoena under the sovereign immunity doctrine.

The distinguishing factors between the case at bar and suits proscribed by *Larson* and *Malone* are these:

In *Malone* and *Larson* (each of which cases involves a dispute between an individual and a government officer over property held or taken by the officer in the constitutional exercise of his statutory power and discretion), no allegations are made that the officer exceeded his statutory powers or that he exercised his statutory powers in a constitutionally invalid manner.

In the instant case the respondent-government officer (1) is shown to have exceeded his statutory authority by using a Revenue subpoena for the purpose of illegally

appropriating attorneys' trial preparation and work product; and (2) the action of the officer is shown to be constitutionally void in that it violates constitutional privileges under the Fourth, Fifth and Sixth Amendments assuring protection against unreasonable searches and seizures, against self-incrimination and deprivation of liberty and property without due process of law and against deprivation of the right to effective assistance of Counsel.

The decision of the Court of Appeals for the District of Columbia Circuit therefore is unsupported by the authorities on which it relies. It is in conflict with decisions of the Courts of Appeals for the Second and Ninth Circuit in *Application of Colton*, 291 F. 2d 487 (C.A. 2, 1961), and *DeMasters v. Arend*, 313 F. 2d 79 (1963), respectively. In fact, as conceded by the Court below, the holding is the expression of a policy adopted by the District of Columbia Court of Appeals to extend the sovereign immunity doctrine in order to limit judicial review in Revenue subpoena cases to the enforcement jurisdiction conferred on the District Court under Sec. 7604(b).

Petitioners urge that such extension of the sovereign immunity doctrine is not only barred under the decisions of this Court but is also undesirable as a matter of policy. The remedies, if any, provided under Sec. 7604(b), are inadequate (if available at all) in the case at bar.

Petitioner-attorneys had standing to sue in order to claim and to protect the constitutional and attorney-client privilege of their clients and to shield petitioners' trial preparation, trial strategy and work product from appropriation by their opponent. The findings and holdings of the District Court to the contrary are clearly erroneous. Unless reversed, a taxpayer's right to assistance of Counsel and an attorney's ability to prepare and defend a civil or criminal income tax case will be severely curtailed hereafter.

ARGUMENT

I. THIS SUIT TO RESTRAIN THE COMMISSIONER OF INTERNAL REVENUE FROM PROCEEDING IN AN UNCONSTITUTIONAL AND ILLEGAL MANNER UNDER COLOR OF AUTHORITY OF SECTION 7602, INTERNAL REVENUE CODE OF 1954, IS NOT BARRED BY THE SOVEREIGN IMMUNITY DOCTRINE.

The Court of Appeals held that the suit should have been dismissed under the Sovereign Immunity Doctrine because (1) "[t]he Commissioner has acted within authority delegated by the statute", 317 F. 2d 123 at 125 (R. 158), and (2) "in this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States". *Ibid.*, p. 126 (R. 159).

The holding, we submit, is factually erroneous on the record below and not supported by the authorities cited in the opinion.

A. There was an unconstitutional departure by the Commissioner from his statutory authority.

Petitioners' sworn complaint in the United States District Court for the District of Columbia alleged, among other things, that respondent-Commissioner of Internal Revenue had served on respondent-accountants three summonses "purporting to have been issued under color of authority of Sec. 7602 of the Internal Revenue Code of 1954" (R. 7); that each such summons was "illegal" and had "been issued in violation of the Constitution of the United States because its enforcement would constitute an unreasonable search and seizure", would force petitioners' clients, the taxpayers, "to incriminate themselves in violation of the Fifth Amendment of the Constitution" (R. 8); "would deprive the taxpayers of the effective

assistance of Counsel" because the documents subpoenaed constituted workpapers of Counsel and of Counsel's employees (R. 9). It alleged further that respondent-accountants (unless restrained) would, in fact, comply with the summons despite is illegality, and would deliver over all the documents subpoenaed (R. 10).

Respondent-accountants in their Answer, admitted all the material allegations of the Complaint. Respondent-Commissioner, without filing an answer, successfully proceeded on a Motion to Dismiss. No affidavits or evidence were submitted in support of the Motion. Thus, for the purposes of determining the correctness of the decisions below, the allegations of the Complaint must be taken as true. *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480 (1947), 68 S. Ct. 174.

Certain of the factual allegations in the Complaint appear conceded of record: Respondent-Commissioner did want to use the information and documents in the Tax Court trial then pending (R. 118), and apparently as evidence against the taxpayers before a Grand Jury because of the "*imminent running of the Statute of Limitations on possible criminal offenses*" (Emphasis supplied) (Opposition to Petition to Stay of Mandate before this Court, p. 2).

B. The authorities cited by the Court of Appeals do not support the decision.

The Court of Appeals cites the decisions of this Court in *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457 (1949), and in *Malone* v. *Bowdoin*, 369 U.S. 643, 82 S. Ct. 980 (1962), as the main authority for its decision. It "recognizes that the two cases relied on concerned suits over property", but erased

all distinction between the four "well defined categories[1] of cases in which claim is made that a suit against one who holds public office is in fact a suit against the government", by holding that the *Larson* and *Malone* doctrine extends to those cases "where the relief sought would 'interfere with the public administration' ".

As additional authority the Court of Appeals cites at p. 125, *Wells* v. *Roper*, 246 U.S. 335, 38 S. Ct. 317 (1918), and *Louisiana* v. *McAdoo*, 234 U.S. 627, 632, 34 S. Ct. 938 (1914). (R. 159)

It is respectfully submitted that the reliance of the Court of Appeals on these four cases is in error. If affirmed by this Court, the opinion would extend the Sovereign Immunity Doctrine far beyond the holding of this Court in *Larson* and *Malone*.

The Court, in order to affirm the decision of the Court of Appeals, we submit, would have to overrule expressly

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[1] "Our decisions fall under these heads:

(1) Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government; or calls for an assertion of what is unquestionably official authority.

(2) Cases in which action to the legal detriment of a plaintiff is taken by an official justifying his action under an unconstitutional statute.

(3) Cases in which a plaintiff suffers a legal detriment through action of an officer who has exceeded his statutory authority.

(4) Cases in which an officer seeks shelter behind statutory authority or some other sovereign command for the commission of a common-law tort."

Larson v. *Domestic & Foreign Commerce Corporation*, *supra*, at 1471-1472, Dissenting Opinion of Mr. Justice Frankfurter.

its prior holdings in *United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240 (1882); *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 23 S. Ct. 33 (1902); *Philadelphia Co.* v. *Henry L. Stimson*, 223 U.S. 605, 32 S. Ct. 340 (1912); *Stark* v. *Wickard*, 321 U.S. 288, 64 S. Ct. 559 (1944); *Land* v. *Dollar*, 330 U.S. 731, 67 S. Ct. 1009 (1947); *Harmon* v. *Brucker*, 355 U.S. 579, 78 S. Ct. 433 (1958); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180 (1958), the entire line of cases in which jurisdiction was upheld because, in the language of *Malone* v. *Bowdoin*, 369 U.S. 643 at 647, 82 S. Ct. 980 (1962), at 983, citing *Larson, supra:* "... the officer's ... exercise [of his statutory powers] ... in the particular case, [is] constitutionally void."

Only brief analysis appears required to highlight the distinction:

Malone v. *Bowdoin* involved an action in ejectment against a forest service officer by persons who claimed that they were the rightful owners of certain land occupied by that officer in pursuance of his official duties on behalf of the United States. The District Court had granted the Motion to Dismiss relying on *Larson*. This Court "granted certiorari to consider the scope of sovereign immunity in suits of this kind", 369 U.S. 643 at 645, 82 S. Ct. 980 at 982, and held that the suit was not within the class of cases in which, under *Larson*, specific relief can be obtained against a government officer (at 648).

Both *Larson* and *Malone*, in holding and rationale, are limited clearly to cases where there was no affirmative allegation of either a relevant statutory limitation of the officer's power to hold or take property, or of an unconstitutional taking of property without just compensation. The Court in both cases based its finding that there was no unconstitutional "taking without just compensation" on there having "been at all relevant times a tribunal where the respondents could seek just compensation for the

taking of their land by the United States".[2] The Court expressly stated that, construed with this limitation, *United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240, had "continuing validity".

In *Reisman* no official holding or taking of property is involved. True, a purported statutory authority is asserted by the officer. But it is clearly alleged by Petitioners that such authority was exceeded in an unconstitutional manner for which no remedy of compensation is available anywhere.

We submit that *Larson*, as construed in *Malone*, does not hold that this mere assertion by the officer that he is acting under authority of statute bars jurisdiction of the District Court to inquire as to whether the officer in fact, does act within the authority of the statute or whether he exceeds his statutory powers. On the contrary, in the last paragraph of the *Malone* opinion this Court specifically states that no claim of an unconstitutional taking had been advanced in *Malone*, nor had it been asserted there that the officer was exceeding his delegated power.

Both claims have been advanced in the case at bar. The sworn and uncontradicted complaint specifically asserts that respondent-Commissioner is exceeding the powers delegated to him by the statute in that he is seeking information not for the purposes for which the statute gave him subpoena power, namely:

> "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax or collecting any such liability . . .",

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[2] 369 U. S. 644 at 647, 82 S. Ct. 980 at 983, Footnote 8.

but that he seeks the information in order to appropriate petitioners' trial preparation and to obtain in an unconstitutional manner evidence for criminal prosecution against petitioners' clients in violation of the Fourth, Fifth and Sixth Amendments to the Constitution.

Last, but not least, attorney-petitioners asserted that the Commissioner sought to deprive them of their own property and work product in an unconstitutional manner. All of the exceptions to the Sovereign Immunity Doctrine —so carefully spelled out both in *Larson* and *Malone*— therefore are clearly present in the case at bar.

This distinction between *Larson* and the line of cases on which Petitioners rely for jurisdiction was clearly expressed by the Court of Appeals for the District of Columbia, sitting *en banc*, in *West Coast Exploration Co.* v. *McKay*, 213 F. 2d 582; 93 U.S. App. D.C. 307 (1954):

> "In brief, the action or inaction questioned in the Larson case was that of War Assets in the exercise of its authority in disposing of surplus property of the Government and in negotiating and performing contracts for such disposal. It was not charged in the complaint that War Assets had acted beyond that authority or unconstitutionally."
> — at pp. 594-595.

The Court then correctly construed the ruling of this Court in *Larson* as based upon the fact that the complaint there had "charged erroneous action on the part of War Assets *within* its authority and not conduct beyond the power of War Assets or of unconstitutional character." *Reisman*, however, clearly charges erroneous action of an unconstitutional character on the part of respondent-Commissioner and also charges that such action is *outside* his statutory authority. The Court of Appeals holding to the contrary is—we submit—in error.

Reliance by the Court of Appeals on *Larson* and *Malone*, therefore, seems misplaced.

Wells v. *Roper*, 246 U.S. 335, 38 S. Ct. 317 (1918), and *Louisiana* v. *McAdoo*, 234 U.S. 627, 34 S. Ct. 938 (1914), the remaining two cases cited as authority for the decision below, are easily distinguished:

Wells v. *Roper* was a suit by Wells, a contractor, against Roper, an Assistant Postmaster General, to restrain the latter from annulling a contract between Wells and the United States for the furnishing of chauffeured limousines in Washington. The Assistant Postmaster General, in the exercise of his discretion and in pursuance of a Congressional appropriation, had decided to purchase automobiles for the government rather than to rent them, and to cancel Wells' contract. This presented a typical *Larson* situation. In this 1918 opinion, this Court pointed out that "no question of Defendant's official authority was involved" and that "[the] United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise".

Thus, without formulating it as clearly as in *Malone*, the Court in effect based its holding in the *Wells* case on the same reasoning: there was neither excess of statutory authority nor "unconstitutional taking without compensation", in view of the availability of the Court of Claims.

Louisiana v. *McAdoo* involved an attempt by the State of Louisiana to restrain the Secretary of the Treasury of the United States McAdoo from instructing customs officers to admit Cuban sugar into the United States at a preferential rate of duty. The decision of this Court turned again on the holding that the Court would not interfere with an official action of a government officer involving the statutorily authorized official exercise of his judgment or discretion. Again, there was no allegation of an unconstitutional action nor did the Secretary of the Treasury exceed his statutory power, defined as the duty "to 'superintend the collection of customs duties as he shall think best'".

Thus, we submit that neither of these two cases can be proper authority for invoking the Sovereign Immunity Doctrine in the instant case, where the Complaint expressly alleges that the respondent did indeed exceed his statutory powers and acted in an unconstitutional manner.

In summary, we submit that while *Malone* v. *Bowdoin* and *Larson* v. *Domestic & Foreign Commerce Corporation* may have further limited the authority of *United States* v. *Lee* to permit suit against an officer in cases involving disputes over title to property (held in his official capacity on behalf of the United States), these holdings have not limited (or construed adversely to petitioners) the holdings of this Court in *Land* v. *Dollar*, 330 U.S. 731 (1947), 67 S. Ct. 1009, that "public officials may become tort feasors by exceeding the limits of their authority", or in *Philadelphia Company* v. *Henry L. Stimson*, 223 U.S. 605, 32 S. Ct. 340, that, "there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds".

On the contrary, *Larson* expressly held:

> ". . . where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."

And this Court said, in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 at 136, 71 S. Ct. 624 at 630:

> ". . . Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

The Court of Appeals for the District of Columbia in an earlier decision in *Dollar* v. *Land*, 154 F. 2d 307 (1946) (affirmed by this Court sub nom. *Land* v. *Dollar*, *supra*), held, we submit, correctly:

> ". . . Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction * * *.' Citing Northern Pac. R. Co. v. North Dakota, 250 U.S. 135, 39 S. Ct. 502, 63 L. Ed. 897."
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> At pp. 310, 311.

Or, as this Court expressed it in *Harmon* v. *Brucker*, 355 U.S. 583, 78 S. Ct. 433, at 435 (1958):

> ". . . Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 108, 23 S. Ct. 33, 38, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U.S. 605, 621-622, 32 S. Ct. 340, 345, 56 L. Ed. 570; Stark v. Wickard, 321 U.S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 733. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries."

In the case at bar where the jurisdictional allegations of "want of power" and "unconstitutional action" were

sworn to, are uncontradicted of record and, in part, conceded, the District Court should not have been ousted from jurisdiction by the Court of Appeals prior to trial on the merits.

C. The decision of the Court of Appeals for the District of Columbia Circuit is in conflict with those of the Courts of Appeals of the Second and Ninth Circuits.

The United States Court of Appeals for the Second Circuit in *Application of Colton*, 291 F. 2d 487 (C.A. 2, 1961), expressly held (at pp. 489 and 490) that a suit to vacate a Sec. 7602 subpoena is not a suit against the government without its consent, citing various prior cases in the Second Circuit which were finally disposed of on the merits without jurisdictional objection by the government.

In *DeMasters* v. *Arend*, 313 F. 2d 79 (1963), the Court of Appeals for the Ninth Circuit held that if defendant-revenue agents were prohibited by statute or by the Fourth Amendment to the Constitution from initiating the inquiry represented by a Sec. 7602 subpoena, "a suit to restrain their unlawful conduct would not be barred by the doctrine of sovereign immunity". (at p. 85)

In support of its holding (*ibid.*, footnote 8), the Court of Appeals for the Ninth Circuit relied on *Malone* v. *Bowdoin, supra, Larson* v. *Domestic & Foreign Commerce Corporation, supra, Harmon* v. *Brucker, supra, Stark* v. *Wickard, supra,* and other cases heretofore discussed.[3]

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[3] The citation to the Ninth Circuit's own holding in *California* v. *Rank*, 293 F. 2d 340 (C.A. 9, 1961) has since proven erroneous. This Court reversed *California* v. *Rank sub nom. Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999 (1963). However, the reversal again was based solely on the application of *Larson* and *Malone* to cases involving the taking of property where the officer "had the power under authorization of Congress to seize the property . . . and this power of seizure was constitutional and permissible"—compensation being available through the Court of Claims.

We respectfully submit that under the holdings of this Court in *Larson* and *Malone* as so recently restated in *Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999, *supra*, the ruling of the Courts of Appeals for the Second and the Ninth Circuits (and those of certain District Courts in the Sixth and Third Circuits[4]) are correct, and the conflict between these Circuits and the District of Columbia Circuit should be resolved by reversing the dismissal below.

D. There is no need for extension of the Sovereign Immunity Doctrine to Section 7602 cases.

a. Policy reasons must not affect interpretation of the doctrine.

The Court of Appeals for the District of Columbia quoted Mr. Justice Douglas' statement in his dissenting opinion in *Malone* v. *Bowdoin, supra,* at p. 650, that "policy considerations, not always apparent on the surface, are powerful agents of decision in sovereign immunity cases".

In effect, the Court below held that as a matter of policy the claims advanced by petitioners should not be adjudicated now but in further and later proceedings under Sec. 7604(b) where "legal objections and privileges can be interposed for judicial decision".

It is respectfully submitted that the function of the sovereign immunity doctrine is not to close the door to

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[4] In *Hinchcliff* v. *Clarke*, 205 F. Supp. 1 (D.C. N.D. Ohio E.D., 1961), the District Court took jurisdiction and the Government failed to interpose the jurisdictional defense. The motion was denied because of simultaneous pending proceedings before the U. S. Commissioner providing adjudication of the merits of the complaint. In *Application of Howard*, 210 F. Supp. 301, 302 (W.D. Pa. 1962), the Court said: "We rejected the Government's contention that this Court had no jurisdiction to quash an internal revenue summons as being an unconsented to suit against the United States . . ."

judicial review wherever a specific district court or court of appeals as a matter of policy holds that a different type of review is preferable. Conversely, it appears equally undesirable and unlawful, to permit judicial review without interposition of the doctrine in a case where, for—possibly transitory—policy reasons, an individual court were to hold that immediate review appears desirable, although such review would be unavailable under holdings of this Court.

It is significant that the judge who wrote the *Reisman* opinion for the Court dissented only a short time later from a decision interposing the sovereign immunity doctrine against review of the action of another officer of the government, the Attorney General, in connection with the Foreign Agents Registration Act. In his dissenting opinion in *Kennedy* v. *Rabinowitz*, 318 F. 2d 181 (C.A.D.C. 1963), at 186, Judge Fahy said:

> "The lines of the immunity doctrine are elusive. As this court suggested in Reisman, policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanctions when the dispute arises out of a regulatory statute like the one before us. As indicated above the dispute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment."

We respectfully submit that Mr. Justice Douglas' statement in his dissenting opinion in *Malone* to the effect that "policy considerations, not always apparent on the surface, are powerful agents of decision" was not made in approval. In its context it was given as "[t]he reason the decisions [in sovereign immunity cases] are not consistent" (369 U.S. at 651).

We further submit that policy reasons should not be the grounds for interposition of the doctrine in case-to-case adjudication. The doctrine of *stare decisis* requires uniform application of the holdings of this Court.

Neither *Larson* nor *Malone* need be overruled (or limited in application or construction) in order to reverse the decision below. While the following quotation is from Mr. Justice Douglas' dissenting opinion in *Malone* v. *Bowdoin*, it is a strong argument for reversal here:

> "What Mr. Justice Miller said in United States v. Lee, supra, 106 U.S. 220, 221, 1 S. Ct. 240, 261, needs repeating:
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> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.' . . ."
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> —369 U.S. 651.

b. Policy reasons—if considered at all—weigh against restriction of review to the remedy provided by § 7604 which is inadequate in this case.

The District Court's jurisdiction under Sec. 7604(a) is not exclusive. *Application of Colton, supra.* There is no valid policy reason to make it so by an extension of the sovereign immunity doctrine.

As a matter of law, the Sec. 7604 enforcement jurisdiction of other courts, in three widely separated locations, did not oust the jurisdiction of the United States District Court for the District of Columbia.

The holding of this Court in *Malone* v. *Bowdoin* (construing *United States* v. *Lee* to be limited in application, because of the availability of the Court of Claims), cannot be interpreted to oust jurisdiction of the District Court for the District of Columbia because of the possibility of review in Sec. 7604 proceeding by another District

Court in Los Angeles, Chicago, or New York. As we interpret *Malone*, it is not the availability of the *remedy* in the Court of Claims that limits the application of *United States* v. *Lee*, but the availability of money-*compensation* through Court of Claims proceedings which frees the "taking" of property of its unconstitutional nature.

In the case at bar, the unconstitutionality of the Commissioner's action is not affected or cured by the availability of another Court in which to complain about it; there is no possibility of just compensation for an unconstitutional search, or for the deprivation of the right to the assistance of Counsel, or for violation of the privilege against self-incrimination.

In the instant case, the remedy provided by this section was totally inadequate. Respondent-accountants intended to comply with the subpoena, thus obviating any further enforcement action by respondent-Commissioner. But, even had there been refusal and subsequent enforcement action, no hearing or remedy would have been assured under Sec. 7604 without clear and present danger of arrest and attachment. *Application of United States (Carroll)*, 246 F. 2d 762 (C.A. 2, 1957), and 149 F. Supp. 634 (U.S. D.C. S.D. N.Y., 1957); *In re Wolrich*, 84 F. Supp. 481 (U.S. D.C. S.D. N.Y., 1949); *Sale* v. *United States*, 228 F. 2d 682 (CA 8, 1956). In an extreme case even criminal proceedings under Sec. 7210 might have been brought. *United States* v. *Becker*, 259 F. 2d 869 (CA 2, 1958).

c. There is no valid policy reason for restricting or for postponing constitutional objections until after criminal indictment.

Nor is there a valid policy of relegating the question as to whether any of the documents subpoenaed were obtained in violation of the taxpayers' constitutional rights to a later motion to suppress during or prior to a criminal

trial.[5] Such procedure is generally unsatisfactory to both the defendant and the government. As Chief Judge Lumbard said in his concurring opinion in *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2, 1962):

> Ordinarily, a summons "is personal to the person to whom it is directed and strangers have no standing either to substitute themselves for the person to whom it is directed, or to quash it." Albachten v. Corbett, 156 F. Supp. 863, 864 (S.D. Cal. 1957). And, as in this case with respect to the summons served on the corporation, the person summoned can, if he chooses, make an indicted taxpayer's objection for him in the form of the first objection above. This was the procedure used in Application of Myers, 202 F. Supp. 212 (E.D. Pa. 1962), and United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953). But if the person summoned chooses not to contest enforcement, a taxpayer's rights in a pending criminal action might go unprotected unless he is permitted to assert them in the enforcement proceedings. The rules of standing are not so rigid that a court whose authority is sought in aid of a summons must keep its doors closed to the taxpayer in such a situation. Neither the taxpayer nor the government would be well served by postponing until trial a hearing of the claim that pre-trial discovery violated the Federal Rules of Criminal Procedure; at that stage it might be very difficult to unravel properly obtained evidence from that which, directly or indirectly, was obtained by allegedly unauthorized means.
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> At p. 18.

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[5] Motions to *dismiss* the indictment in a criminal case cannot be based on the fact that evidence illegally obtained was produced before the grand jury. *U.S.* v. *Nunan*, 236 F. 2d 576 cert. den. 353 U.S. 912, rehearing denied 353 U.S. 952.

d. Adjudication on the merits would have furthered rather than delayed legitimate investigation.

Nor can it be said that an adjudication below of the complaint on its merits would have delayed or hampered respondent-Commissioner's investigation. The suit was promptly brought in one centrally located District Court prior to the return date of the subpoenas. Enforcement proceedings, on the other hand, could not have been commenced by respondent-Commissioner until after the return dates expired; they would have had to be adjudicated in three widely separated District Courts. Appellate proceedings in three courts might have led to conflicting results; would have certainly been extended and might have involved additional and collateral problems of *res judicata* and *collateral estoppel*. By erecting the barrier of the sovereign immunity doctrine against petitioners' application for prompt adjudication of essentially simple questions of fact and law, the Court of Appeals has, in fact, delayed rather than advanced any aspects of respondent-Commissioner's investigation which, upon trial on the merits, might have been found legitimate and constitutional.

II. PETITIONER-ATTORNEYS WERE ENTITLED TO A PRELIMINARY INJUNCTION ON THE FACTS OF THIS CASE.

Although urging dismissal under the sovereign immunity doctrine below, the government (in its opposition to the Petition for Certiorari) admits now that the appellate court's adoption of the doctrine in this case "raises questions of some difficulty".[6] It urges that these questions should not be decided but that petitioners' action should be dismissed substantially on the grounds advanced by the District Court.

It is respectfully submitted that the District Court's holding that petitioners had "no standing to sue" is

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[6] Brief in Opposition, p. 6.

clearly erroneous and that the Court of Appeals should have reversed the District Court's decision with directions to grant the injunction.

A. Constitutional as well as the attorney-client privilege protects all documents.

More than a year prior to the issuance of each summons an alleged multi-million dollar tax deficiency had been statutorily "determined" by respondent-Commissioner. The determination was contested by the taxpayers through petitioner-attorneys and (at the time of issuance of each summons) was awaiting immediate trial in the Tax Court.

Only one month prior to the issuance of each summons, petitioners and their clients had been advised that a criminal investigation was pending against the taxpayers and the taxpayer[1] personally had claimed his constitutional rights under the Fifth Amendment (R. 7).

Neither petitioner-attorneys nor respondent-accountants had provided any accounting advice in connection with the preparation of any of the tax returns in issue. As it were, respondent-accountants were specifically retained by petitioner-attorneys as late as April 25, 1960, "to assist [the attorneys] in connection with the above tax matters", i.e. the Federal tax liability of 1953 to 1956, inclusive, by the clients (R. 18). Thus whatever work was done did not change or affect the liability or determination.

The documents in dispute fall into four over-all categories:

(1) Original, personal, records of the individual taxpayers, as, for instance, cancelled checks, books of account, etc.;

[1] Taxpayers are husband and wife. The wife is involved only because of the filing of joint returns.

(2) Original records of a foreign corporation in which the husband-taxpayer had a minority interest.[8]

(3) Worksheets, analyses, schedules and similar material reflecting petitioner-attorneys' instructions, trial preparation and trial strategy, though physically reduced to writing by respondent-accountants at the direction or under supervision of petitioner-attorneys; and

(4) Memoranda and correspondence between attorney-petitioners and accountant-respondents containing instructions by, or reports to, petitioner-attorneys with regard to such trial preparation.[9]

(a) Each subpoena is unconstitutional as to the individual taxpayers' records because the records could not have been subpoenaed from taxpayer.

In the ordinary, small and uncomplicated tax case, the first two categories of documents (client's original records) would normally be delivered to an attorney's office for his analysis and use in trial preparation.

It is now established law in at least three Circuits that documents that are privileged and therefore cannot be lawfully subpoenaed while in the hands of the taxpayer, do not lose their immunity from subpoena when they are delivered from the physical possession of the taxpayer into the physical possession of his attorney.

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[8] Petitioner-attorneys represent this foreign corporation in connection with other matters.

[9] On argument before the District Court, respondent-Commissioner abandoned all claim to the documents in the 4th category, as well as to documents which were not located within the United States. (R. 138 and 148).

The Court of Appeals for the Ninth Circuit in the very recent case of *United States* v. *Judson*, F. 2d (C.A. 9, July 30, 1963), 63-2 USTC, ¶ 9658, said:

> "We have not been directed to, nor have we found any Supreme Court decision dealing with the precise problem before us now. The closest case is *Grant* v. *United States*, 227 U.S. 74 (1912). In that case, a subpoena duces tecum was served upon an attorney directing him to produce corporate documents which had been delivered to him by his client, Burlingame. The court said, 227 U.S. at 79-80:
>
> > 'The inquiry thus remains whether in these circumstances Grant [the attorney] could refuse their production if they would tend to incriminate his principal.
> >
> > 'Although the merits of the constitutional question are thus before us, it does not require extended discussion in view of the recent decisions of this court. The books and papers called for by the subpoena were corporate records and documents . . . They remained subject to inspection and examination when required by competent authority, and *they could not have been withheld by Burlingame himself upon the ground that they would tend to incriminate him.*' (Italics added.)
>
> "The implication from the quoted portion is that if the client *could* have withheld the documents, a *different question* would exist—a question not entirely answered by the *Hale* and *Wilson* doctrines. We feel a different question does exist. Our task is to determine whether a different result obtains."

—at p. 89645

The Court carefully analyzed and cited with approval, the case of *Application of House*, (relied on by petitioners below):

> ". . . the court in *Application of House* [56-2 USTC ¶ 9780], 144 F. Supp. 95 (N.D. Cal. 1956), had the

question squarely before it. In that case, the taxpayer had instructed his accountant to turn over to his attorney all work sheets pertaining to the taxpayer. The request was made for the purpose of aiding the attorney in representing the taxpayer in a pending tax investigation. In the course of that investigation, an administrative subpoena was served upon the attorney, directing him to produce the work sheets. As pre-existing documents, they did not fall within the attorney-client privilege, although the delivery had been made in the course of an attorney-client relationship. Indeed, the entire transaction which brought together the attorney, the taxpayer and his records was for the purpose of preparing a defense to the very investigation upon which the issuance of the subpoena was predicated. The court held that under the circumstances the attorney could rightfully refuse to produce the documents by reason of his client's Fifth Amendment privilege. The court said, 144 F. Supp., at 100:

> 'Thus, on the question of the lack of standing of an attorney to raise the claim of privilege for his client although the client does not himself utter the words effectuating the claim, or is not himself physically present, the government cites no convincing authority. The government apparently seeks to establish a novel rule that unless the client himself participates in hearings such as the one held before the agent of the Internal Revenue Bureau, he waives his Constitutional rights. The government could thus put any taxpayer to the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination. Such a rule would accomplish nothing except to impose a heavy penalty in terms of time and money on those taxpayers who chose to assert their right against self-incrimination under the Constitution. The effective exercise of Constitutional rights should not be abridged by any such technical and onerous requirements as that.' "

It distinguished the two cases alleged by the government to be in conflict with this decision: *United States* v. *Boccuto*,

175 F. Supp. 886 (D. N.J. 1959), and *Bouschor* v. *United States*, 316 F. 2d 451 (C.A. 8, 1963), and came to the conclusion that the "raw logic of the matter" compelled agreement with the *House* case.

Inasmuch as the Court expressed the compelling logic of its decision so much better than petitioners' Counsel could ever attempt, a quotation *in extenso* from the opinion follows:

> "The raw logic of the matter compels us to agree with the court in *Application of House, supra.* Clearly, if the taxpayer in this case, or in *House*, had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less. The way was clear, according to appellant, for an enforcement officer to gather up the evidence which otherwise would have been beyond his reach. The taxpayer's only recourse would be the marathon footwork indicated in *House*.
>
> "The thrust of the Fifth Amendment is that 'prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law.' *United States* v. *White, supra,* 322 U.S. at 698. The records now in question were not 'independent', in the sense that term is used in *White*, while in the hands of the taxpayer. By what magic did they become 'independent' when handed to an attorney for the purpose of effectively representing the taxpayer in an investigation which gives the records significance?
>
> "It has been said that since only the privilege-holder knows what will or will not incriminate, he alone knows whether the privilege should be asserted.

This reasoning is akin to the proposition that 'no one needs a lawyer to tell him he is right or wrong unless he knows he is wrong.' The government, in its brief, does recognize that 'the function of the lawyer, here, is to advise on the legal implications of disclosure.' (This puts it mildly as the setting 'here' is a tax investigation.) Guilty knowledge is no more a prerequisite for the Fifth Amendment's protection than an inference of guilt is a product of it assertion.

"The government contends that only the person who might be incriminated knows the full evidentiary facts necessary to determine if the disclosure of the information sought might tend to incriminate him, and that 'the courts should not allow this decision to be delegated to an agent.' But the decision whether disclosure might tend to incriminate is not made by the privilege-holder, his attorney, the prosecution or the jury. It is made by the court. The process for determining the incriminating character of evidence is plainly set forth in *Hoffman* v. *United States*, 341 U.S. 479 (1951). Again we emphasize that the incriminating character of the evidence is not in question in this case.

"The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other 'third party', nor 'agent', nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.

"The government argues that if the privilege-holder doesn't want the protection offered by the Amendment, law enforcement would be needlessly hampered if someone else were allowed to invoke it. The argument has merit where the hypothesis is correct. But again, the argument loses sight of the attorney's role: as an advocate of the client's position, he is deemed to know that position.

"There can be little doubt of the taxpayer's position here. This is not a situation where the privilege-holder thought so little of the privilege, or so doubted its applicability, that he allowed the judicial process to ignore it. The taxpayer knew that his attorney was withholding documents from the grand jury, and he knew the grounds asserted. He was present and testified at the hearing on appellee's motion to quash. True, no one asked him if he desired the result his attorney was so arduously trying to achieve. But if the government thought for one minute that the taxpayer was willing for the information to be disclosed, would it have remained so mute?

"We feel that the privilege-holder's mental attitude was sufficiently demonstrated by the circumstances to be consistent with a desire for the protection of the privilege and inconsistent with an inference of waiver. This is enough, when coupled with a timely and effective assertion by the attorney, to invoke the privilege. The privilege must then be respected if the client himself could have successfully raised it.

* * *

"The government has at its disposal inquisitorial powers and administrative procedures which it may invoke at its pleasure. If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer were not available to utter the magic words. In our judgment, the inherent power thus to compel indirectly an individual's self-incrim-

ination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly."

—*United States* v. *Judson*, 63-2 USTC ¶ 9658, pp. 89647, 89648.

The Court of Appeals for the Second Circuit arrived at a similar holding in *United States* v. *Guterma*, 272 F. 2d 344 (1959). So did the Eighth Circuit in *Schwimmer* v. *United States*, 232 F. 2d 855 (1956).

We respectfully submit that under *Grant* v. *United States*, *supra*, the holding in these three Circuits is in accord with the law as laid down by this Court.

(b) The workpapers reflecting trial strategy are immune from subpoena under the Fifth and Sixth Amendments.

For the third category of papers, the accounting analyses, worksheets and schedules prepared by respondent-accountants either for, or in cooperation with, or under supervision of, petitioner-attorneys, the main constitutional claim for protection rests on the taxpayers' right to the effective assistance of Counsel and due process of law.

No demonstrative evidence is required to show that to a tax attorney or revenue agent, detailed accounting analyses of taxpayers' transactions demonstrate the theories of defense as clearly as if they were spelled out in a trial brief. That disclosure in advance of trial or during a pending criminal investigation of theories of defense would hamper effective assistance by Counsel, requires no elaboration.

The schedules further reflect information that the client furnished through the accountants to the attorneys. The accountants here intervened for the sole purpose of relating such client information in intelligible and intelligent form to the attorneys so that Counsel would be able to understand, digest and evaluate the raw information provided by the client. In *Lewis* v. *United Airlines Transport*

Corporation, 32 F. Supp. 21 (W.D. Pa. 1940), and *Schuyler* v. *United Airlines*, 10 F.R.D. 111 (M.D. Pa. 1950), the attorney needed an expert in connection with an airplane crash; in *Lalance and Grosjean Mfg. Co.* v. *Haberman Mfg. Co.*, 87 Fed. 563 (2d Cir. 1898), and in *Cold Metal Process Co.* v. *Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947), he needed a patent expert. In all these cases the attorney-client privilege was held to extend to the assistant or amanuensis, required by the attorney to give effective assistance.

The Court of Appeals for the District of Columbia has recognized the constitutional right to effective assistance of Counsel in two cases, holding:

> "These cases unequivocally establish the principle that the two amendments guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner."
>
> —*Coplon* v. *United States*, 191 F. 2d 749, 759 (C.A. D.C. 1951), 89 U.S. App. D.C. 103, (Cert. Den.) 72 S. Ct. 363, 342 U.S. 926, 96 L. Ed. 690;

and

> "The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense."
>
> —*Caldwell* v. *United States*, 205 F. 2d 879, 881 (C.A. D.C. 1953), 92 U.S. App. D.C. 355.

Coplon very effectively showed that denial of the effective assistance of Counsel is not only in violation of the Sixth, but also of the Fifth Amendment to the Constitution.

"We are confronted, however, with another and a a much more serious question with respect to the government's alleged wiretapping. In support of her motion for a new trial, the appellant charged that Bureau agents intercepted telephone conversations between her and her counsel, both before and during her trial in the District of Columbia.

"If this occurred, it was a violation of the appellant's constitutional rights. The Fifth Amendment enjoins that no person be deprived of life, liberty or property without due process of law. Such due process includes the right of one accused of crime to have the effective and substantial aid of counsel. *Neufield* v. *United States* (1941), 73 App. D.C. 174, 182, 118 F. 2d 375, 383. Moreover, the Sixth Amendment provides that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.'"

—at p. 757.

Whether the government obtains access to trial preparation and attorney-client consultation by wiretap or by subpoena, is immaterial as far as the constitutional prohibition is concerned.

There can be no doubt that in the instant case the intended violation of the Fifth and Sixth Amendments was more than incidental. Both in the Court below and before this Court, respondent-Commissioner has urged speedy determination in view of the possible running of the criminal Statute of Limitations (Opposition to Stay, p. 2). The subpoenas were issued by a Special Agent, not a Revenue Agent, whose sole function is that of seeking evidence of crimes.[10]

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[10] In an article by Joseph W. Burns, entitled "Searches and Seizure" [reprinted in 20 Institute of Federal Taxation, New York University 1081, 1087 (1962)], the distinction is very clearly set out:

"Some courts have failed to realize the great distinction between the function of an Internal Revenue Agent and a

As the Court said in *United States* v. *O'Connor*, 118 F. Supp. 248 at 250 (D.C. Mass. 1953):

"So far as this Court knows, Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases. Cf. In re National Window Glass Workers, D.C.N.D. Ohio, 287 F. 219. Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., has only the limited function of procuring production of papers for use in evidence at a trial. It is not the equivalent of pretrial discovery. Cf. Bowman Dairy Co. v. United States, 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879.

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to

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Special Agent. The Constitution gives the government the right to collect taxes and Congress has enacted statutes containing various provisions to enable the Commissioner of Internal Revenue to investigate both civil tax liability and criminal offenses against the revenue. These are two separate and distinct functions, and he has set up separate and distinct divisions to carry out these functions. The function of investigating to determine civil tax liability has been assigned by the Commissioner to Internal Revenue Agents, who are in the Audit Division. (26 CFR 601.105(b)).

"The sole function of a Special Agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the Revenue Agent. He is exactly the same as any other Treasury agent who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A Special Agent is a criminal law enforcement officer, just like any state or municipal detective or policeman. He, like any other government agent who enforces the criminal law must obtain a valid search warrant."

subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652.

"To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power."

Thus, categories 1 and 3 of the records subpoenaed were clearly protected by the taxpayers' constitutional privileges under the Fourth, Fifth and Sixth Amendments and by the common-law attorney-client privilege as such. Certain of the documents in the second category (the corporate papers) were equally protected by the attorney-client privilege. *Radiant Burners, Inc.* v. *American Gas Association*, F. 2d (C.A. 7) (No. 13960, C.A. 7, June 28, 1963). In addition, the records belonging to the foreign (non-U. S.) corporation were, and still are claimed, as being immune to subpoena because of the fact that the corporation is not subject to the visitorial or regulatory power of the sovereign, the custodian of the corporate records holding them "in a purely personal capacity". 8 Wigmore on Evidence, Sec. 2259(b), Supp. p. 129; *Application of Daniels* (D.C. S.D. N.Y.), 140 F. Supp. 322 (1956), affirmed *sub nom. International Commodities Corporation* v. *I.R.S.*, 224 F. 2d 882 (1955).

(c) The attorney-client privilege applies because the accountants acted as the attorneys' agents.

Neither the constitutional nor the attorney-client privilege was lost because some of the worksheets prepared under the supervision, or for the use, of the attorneys were, in fact, physically put on paper by non-attorney accountants.

The accountants in this case were hired by the attorneys for one purpose, and one purpose only: to help them in the preparation of these civil and criminal cases. Except for their special skill, they were in the identical legal position as petitioners' stenographer and petitioners' law clerk who had not yet passed the bar, and whose research was a vital link in providing the legal advice petitioners were retained to furnish. No accounting advice was needed or received by the taxpayer nor by the attorneys, and the District Court's finding to the contrary (R. 148, 149) was clearly erroneous.

The Court of Appeals for the Second Circuit has recognized the necessity for the employment by attorneys of accountants in these days of increasing difficulty and magnitude of business transactions. In *United States* v. *Kovel*, 296 F. 2d 918 (C.A. 2, 1961), the Court held:

> ". . . In contrast to the Tudor times when the privilege was first recognized, see 8 Wigmore, Evidence § 2290, the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. 'The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agent.' 8 Wigmore, Evidence, § 2301; Annot., 53 A.L.R. 369 (1928).
>
> —at p. 921.

Petitioners therefore were entitled to the relief prayed for, pending trial on the merits. At the very least, the Court of Appeals should have remanded the case to the District Court for an *in camera* inspection of the documents for which privilege was claimed.

B. Petitioners have standing to sue to protect their work product and their professional ability to function as attorneys.

Petitioners argued below and argue before this Court that—while the constitutional and attorney-client privileges are originally the clients' to claim—the attorneys have standing to sue in order to enforce such claim in their clients' behalf. *Baird* v. *Koerner*, 279 F. 2d 623 (C.A. 9, 1960); *United States* v. *Judson*, *supra*.

But petitioners also argued below and argue here, that they had standing to protect their own ability as attorneys to render effective assistance to their clients. *Warrick* v. *C.I.R.*, 173 F. 2d 905 (C.A. 8, 1949). Failure to bring this suit in order to prevent unconstitutional seizure of the documents entrusted to them might have constituted an effective but unauthorized and therefore actionable waiver of the clients' constitutional rights. *United States* v. *Bender*, 218 F. 2d 869 (C.A. 7, 1955), and *Banks* v. *United States*, 204 F. 2d 666 (C.A. 8, 1953).

Finally, they argue that Conclusion of Law No. 4 by the District Court (R. 149) to the effect that "the work papers and audit reports prepared by the accounting firm of Peat, Marwick, Mitchell & Co. constitute the work product of the accountants and not the work product of the plaintiffs", is clearly erroneous. All the work of the respondent-accountants was done under the supervision, with the help and direction of the petitioner-attorneys, reflecting the attorneys' mental impressions and ideas. Therefore it is petitioners' work product which they have "standing" to protect against unlawful appropriation.

In *Hickman* v. *Taylor*, 329 U.S. 495, 67 S. Ct. 385 (1947), this Court protected the work product of an attorney although it consisted of witnesses' oral statements as taken down by, or for the attorney.

In the instant case the work product protection is invoked on, we submit, even stronger grounds than in *Hickman* v. *Taylor:* (1) not only did the attorneys intend to use the accountants as witnesses in the trial of the tax cases,[11] but (2) the worksheets of the accountants also reflected various legal theories of the attorneys which the accountants in the course of their work proved out mathematically. Some of these theories might later be discarded as unprovable; others would be, indeed, revealed at the trial of the case. Regardless, all of them were reflections of the mind of Counsel and "no legitimate purpose" could have been served by their production. *Hickman* v. *Taylor, supra,* at 513; 67 S. Ct. at 394.

It is submitted that had these worksheets been in the physical possession of the attorneys at the time of issuance of the subpoenas, the attorneys would have had standing to sue to protect their unconstitutional appropriation by respondent-Commissioner through subpoena directed to them. Under the ruling of *United States* v. *Guterma, supra,* and *United States* v. *Judson, supra,* the fact that they were in petitioners' constructive possession only, rather than physical, did not deprive petitioners of their standing in Court.

CONCLUSION

It is prayed that, inasmuch as (1) the suit below was not barred by the sovereign immunity doctrine; (2) petitioners had standing to sue; and (3) petitioners were entitled to the relief prayed for, the Judgment of the

[11] Two representatives of respondent-accountants did, in fact, appear at the trial of the cases in Los Angeles.

Court of Appeals be reversed, with instructions to remand the case to the United States District Court for the District of Columbia to issue the injunction, pending trial on the merits.

Respectfully submitted,

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Dated: September 25, 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN, ET AL., PETITIONERS

v.

HON. MORTIMER M. CAPLIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT CAPLIN

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the district court denying the motion for a preliminary injunction and dismissing petitioners' complaint (R. 145–150), are not officially reported. The opinion of the court of appeals (R. 156–161) is reported at 317 F. 2d 123.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1963 (R. 162). The petition for a writ of certiorari was filed on May 8, 1963, and was granted on June 17, 1963 (R. 163; 374 U.S. 825). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Internal Revenue Code establishes a comprehensive procedure for the issuance of summonses in aid of the determination or collection of any tax liability and for the enforcement of such summonses by the courts. The questions presented are:

1. Whether petitioners' complaint, which sought to enjoin the Commissioner of Internal Revenue from attempting to enforce certain summonses by court action, constituted a suit against the United States without its consent.

2. Whether petitioners have an adequate remedy at law by way of defense to the Commissioner's enforcement action so that their injunction suit, if not barred by sovereign immunity, is subject to dismissal for want of equity.

STATUTES INVOLVED

Sections 7210, 7402, 7421, 7602 and 7604 of the Internal Revenue Code of 1954 and Sections 1340 and 2201 of 28 U.S.C. are set out in the Appendix, *infra*, pp. 55–58.

STATEMENT

On July 7, 1961, petitioners filed a complaint in the United States District Court for the District of Columbia asking declaratory and injunctive relief against respondent Caplin, the Commissioner of Internal Revenue (R. 2–16), and against the respondent accounting firm, Peat, Marwick, Mitchell & Company. The allegations of the complaint may be summarized as follows:

In April 1960, petitioner Reisman, an attorney who has represented a taxpayer named Bromley for over ten years, retained the other three petitioners as associate counsel in connection with Bromley's tax problems (R. 2–5). In preparing for the trial of Tax Court cases involving Bromley's income tax liabilities for the years 1953 to 1956, and also in view of possible criminal prosecution, petitioners decided that they needed skilled accounting advice and engaged respondent Peat-Marwick (R. 3–4, 5, 118). Thereafter, under the supervision of petitioners, Peat-Marwick analyzed various original records of Bromley and his corporations, and periodically reviewed its findings and tabulations with petitioners (R. 5, 45–46). Pursuant to petitioners' instructions, the accounting firm segregated and labelled all products of their joint work with petitioners, together with Bromley's original records, as the property of petitioners in which the accounting firm claimed no property rights (R. 6, 44–45).

After being informed by an Internal Revenue Service official that no criminal action was contemplated against Bromley, petitioners tentatively agreed to make some of the records and accounting information available to the Service for the purpose of settling the Tax Court cases (R. 6). Thereafter, at a conference attended by Bromley and petitioners, Revenue officials warned that a criminal investigation against Bromley was pending, and Bromley refused to make his papers available and refused to waive his constitutional rights (R. 6–7, 46).

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Some three weeks later, on June 13, 1961, respondent Caplin caused summonses to be served upon the Los Angeles, Chicago and New York offices of Peat-Marwick, directing the firm to appear at a stated time and place and testify as to the tax liability of Bromley for the years 1957–1959, and as to the tax liability of Service Games, Inc.—Panama, for the years 1953–1959 (R. 7–8, 19–40). The summonses also directed the firm to produce "all audit reports, work papers and correspondence" in its custody pertaining to Bromley and certain named partnerships for the years 1957–1959, and "All books, documents and records" in its custody pertaining to named corporations for the pertinent years (R. 19–40). The summonses stated that failure to comply "will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience" (*e.g.*, R. 20). Petitioners were informed that Peat-Marwick would "attempt to comply" with the summonses unless enjoined (R. 10).

Upon the basis of the foregoing allegations, the complaint concluded that enforcement of the summonses would be an unreasonable seizure, could force Bromley to incriminate himself, and would deprive Bromley of effective assistance of counsel by revealing to the government the preparations his counsel had made for the Tax Court cases (R. 8–10, 46). The complaint asked the court to declare the summonses null and void, and to issue a temporary restraining order and permanent injunction enjoining respondent

Caplin (and his agents and successors in office) from attempting to enforce the summonses by court action, and enjoining the respondents Harney and MacClure (as representatives of Peat-Marwick) from testifying or from producing records in response to the summonses (R. 10–15).

With the complaint, petitioners filed a motion for a temporary restraining order and a preliminary injunction supported by an affidavit of petitioner Nathan alleging that Peat-Marwick had been engaged solely to assist petitioners in preparation for trial of the Tax Court actions; that Peat-Marwick had agreed that all records, papers and work sheets involved should remain the property of petitioners; and that Peat-Marwick would comply with the summonses unless enjoined, "so as not to risk attachment for contempt" for disobedience to the summonses (R. 41–47). The district court granted the temporary restraining order (R. 53–57).

Respondent Caplin moved to dismiss the complaint on the grounds (1) that petitioners had no standing to sue; (2) that the district court had no jurisdiction to enjoin the assessment and collection of a federal tax; (3) that declaratory relief with respect to federal taxes is specifically prohibited by statute; and (4) that the complaint failed to state a cause of action (R. 58, 71).

The respondents Harney and MacClure, as representatives of Peat-Marwick, filed an answer (R. 107–111) which admitted the essential allegations of the complaint, except for the allegation that they would voluntarily comply with the summonses. As to this,

they admitted "that if the mentioned Summonses are complied with and will have to be complied with, that they will be called upon to deliver up * * * work-papers, records and documents belonging to [petitioners] * * * and this could compromise trial preparations" in the Tax Court cases (R. 110). They joined in the prayer for relief of petitioners' complaint (R. 110–111).

The district court, upon consideration of the pleadings, interrogatories, and argument (R. 64–70, 102–107, 112–145), found that petitioners had hired Peat-Marwick to examine the books of Bromley, his corporations and his partnerships in connection with his tax liabilities; that Peat-Marwick had examined various original books and records and had prepared work papers and audit reports; that all the work on the work papers and audit reports sought by the summonses had been performed by Peat-Marwick; and that the summonses required nothing of petitioners. The court concluded that petitioners had no standing to sue; that they had failed to state a cause of action; that the original books and records were not the work product of petitioners; that the work papers and audit reports were the work product of Peat-Marwick; and that none of the documents sought by the summonses fell within the attorney-client privilege (R. 145–149). Petitioners' motion for preliminary injunction was denied, and the government's motion to dismiss the complaint was granted (R. 149–150).

The court of appeals affirmed the dismissal of the complaint on the ground that the suit was in substance one against the United States to which it

had not consented, and was therefore prohibited under the doctrine of sovereign immunity (R. 156–161). While recognising the right to sue an officer of the United States as an individual where the acts complained of are beyond the scope of his statutory authority, the court held that Section 7602 of the Internal Revenue Code, pursuant to which the instant summonses were issued, "clearly authorizes" the Commissioner to proceed as he did in this case (R. 159). The court concluded (R. 159–160):

> [I]n this case the Commissioner does not appear as yet to have departed from his statutory authority, to say nothing of having so departed as to justify interpreting the suit to be one against him personally, rather than in substance and effect against the United States. In so viewing the matter we have in mind that the effort is to stop the United States, acting through the Commissioner, his successors and agents, from initiating further steps to obtain documents which the persons summoned cannot be compelled to produce unless and until enforcement proceedings are pursued.

Since the filing of the complaint, the Tax Court cases have been tried and are now awaiting decision (Pet. Br. 38).[1]

SUMMARY OF ARGUMENT

Petitioners, claiming that summonses issued by the Commissioner of Internal Revenue are invalid and that compliance would violate their constitutional rights and those of their client, sued to enjoin enforcement of the summonses and for a declaration

[1] See footnotes 21, 29, *infra*.

that they are null and void. The Internal Revenue Code constitutionally authorizes the issuance and enforcement of such summonses in aid of the determination or collection of a tax liability. These statutory procedures afford persons summoned and interested third parties such as petitioners a full opportunity to test the validity of the summonses and to assert their constitutional rights. Under the circumstances, petitioners' action was properly dismissed as a suit against the United States without its consent and, wholly apart from the doctrine of sovereign immunity, because petitioners have an adequate remedy at law.

A. The Internal Revenue Code establishes a comprehensive scheme for the issuance and judicial enforcement of summonses by the Commissioner. The Code authorizes the Commissioner to issue summonses for the purpose of determining or collecting any tax liability. Under orderly procedures established by the Code, persons summoned and interested third parties may raise objections to the validity of the summonses and assert their constitutional rights in administrative proceedings before a Special Agent. If the Commissioner wishes to enforce compliance, he must proceed before a federal district court or a United States Commissioner who will hold a hearing and, if the defenses are found unmeritorious, may order compliance and commit the witness until he complies. Such an order is immediately appealable.

The Code also provides that a person who "neglects to appear or to produce" in compliance with a summons may be subject to criminal prosecution. This provision applies only where there is a wilful "neglect" and is avoided by one who appears and claims defenses as grounds for noncompliance. Thus, the Code neither forecloses defenses nor compels any person to risk punishment in order to test his rights and the validity of the summons.

The comprehensive nature of these statutory provisions for issuance and enforcement of summonses indicates that Congress intended them to be the sole means for obtaining judicial review.

B. There is no basis for a claim that the Code provision for the issuance of summonses is unconstitutional. Nor may it be contended that the provisions for enforcement of summonses are unconstitutional on the ground that the penalties risked by a refusal to comply are so severe that requiring taxpayers or witnesses to observe the statutory procedures amounts to a denial of judicial review. In *Ex parte Young*, 209 U.S. 123, in which the Court enunciated the latter principle, the penalties for noncompliance with rate regulations were imprisonment without regard to wilfulness and the daily accrual of enormous fines. No such penalties are imposed by the Code and indeed a simple appearance and assertion of defenses before the Special Agent avoids any risk of punishment.

C. It is neither contrary to the Code nor unconstitutional to apply the statutory provisions for enforcement to summonses addressed to Peat-Marwick

for documents which allegedly belong to petitioners or their client. In the first place, it is doubtful that Peat-Marwick has any rights to refuse to comply—the rights described in this action being those of third parties—but such rights as it may have may all be tested administratively and then in the courts under the procedures set up by the Code. In the same way, petitioners may test their asserted rights—if any—to prevent compliance by Peat-Marwick with the summonses.

The possibility that Peat-Marwick might voluntarily turn over the documents before the return date of the summonses does not give petitioners or their client a constitutional ground for avoiding the statutory process for review. First, the pleadings show no real threat of such an action by Peat-Marwick. Second, the possibility of a voluntary disclosure, if it does exist, is merely the usual risk assumed by one who turns his documents over to a third party. Finally, petitioners or their client may protect their rights by an action to compel Peat-Marwick to respect those rights pending a judicial order in enforcement proceedings brought by the Commissioner.

II

Since the Commissioner acted within his statutory and constitutional authority, this action to circumvent the statutory procedures for review should be dismissed as a suit against the United States without its consent.

A. It is part of the Commissioner's official duty to issue and enforce summonses. His performance of

this duty is an action of the United States. The relief sought by petitioners would interfere with this action. It is therefore a suit against the United States without its consent, barred by the doctrine of sovereign immunity.

B. This suit does not fall within either of the recognized exceptions of the doctrine of sovereign immunity, *i.e.*, that a suit against a government official becomes one against him as an individual if (1) the official exceeds his statutory authority, or (2) that authority or its exercise is constitutionally void. As to the first exception, petitioners argue that the Commissioner desired the documents for unauthorized purposes: for use in connection with litigation pending in the Tax Court against their client Bromley and as evidence for use in a possible criminal prosecution against him. Even if petitioners were right as to the Commissioner's purposes and authority, this would only establish that the Commissioner had made "an incorrect decision as to law." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 695. The Commissioner's power is to decide when to issue and not to issue summonses and his error in determining the extent of that power would not avoid the bar of sovereign immunity.

Nor is there any basis for bringing this case within the second exception of the doctrine of sovereign immunity. As noted, neither the Commissioner's powers to issue and enforce summonses nor their exercise here is unconstitutional. The statutory procedures for administrative and judicial review offer a complete opportunity for interested persons to seek

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correction of any error of the Commissioner in issuing the summonses and to vindicate any possible constitutional rights to avoid compliance.

C. Invocation of the doctrine of sovereign immunity in this case serves the most practical considerations of tax administration and results in no injustice. The question is not whether petitioners, their client or Peat-Marwick should be compelled to turn over documents without an opportunity to obtain judicial review of their claims that the summonses are invalid and that production would violate their constitutional rights. Rather, the question is whether petitioners may avoid the orderly procedures established by the Code for such review and stop the administration of the revenue laws in its tracks.

To permit this action to be maintained could lead to a multiplicity of litigation. Since petitioners' suit was commenced before there had been an opportunity for the Commissioner to pose particular questions or request the production of specific documents, a decision in his favor here might not finally determine all issues with respect to the summonses. If Peat-Marwick thereafter should refuse to comply, the Commissioner would then have to institute enforcement proceedings in the district court. The additional litigation, which might entail a substantial and unnecessary delay in the collection of the revenue, will be avoided if persons summoned are required to assert their defenses in orderly fashion first before the Service and, should they be rejected, in the ensuing enforcement proceedings.

III

Petitioners have failed to demonstrate that they are entitled to injunctive relief, the basis of which has always been the threat of irreparable harm and the lack of an adequate remedy at law. That petitioners have such a remedy is clear since the same defenses and privileges which they assert in this action may be raised by them before the Special Agent and in any future judicial action by the Commissioner for enforcement. Petitioners seek to justify their resort to equity by the allegation that an advance determination is necessary because Peat-Marwick would have complied with the summonses unless enjoined by court action. However, the pleadings appear to refute the allegation and, in any event, do not establish a clear risk of irreparable harm warranting intervention by a court of equity. Further, petitioners could have adequately protected their rights simply by bringing an action against Peat-Marwick to enjoin compliance until ordered to do so in enforcement proceedings brought by the Commissioner.

Nor is there merit to petitioners' remaining allegation that equity should act at their behest to protect Peat-Marwick from the risks of arrest or criminal prosecution entailed by disobedience of the summonses. Since petitioners themselves face no such risks, they have no standing to invoke the aid of equity. Moreover, even if petitioners were entitled to assert Peat-Marwick's rights as grounds for equitable relief, there would be no basis for the court to

act. Thus, it is clear that Peat-Marwick may effectively eliminate any risk of arrest or criminal prosecution simply by appearing in response to the summonses and claiming any privileges at that time. Even if it be conceded that the possibility of criminal prosecution could arise under certain circumstances, it is well established that a court of equity will not intervene to enjoin enforcement of a criminal statute where the penalties for disobedience (as here) are not such as to result in severe financial loss by way of cumulative penalties or otherwise.

IV

If this Court were to hold that the action is maintainable, we agree with petitioners that it should remand the cause to the district court for a hearing on the merits of their complaint for a permanent injunction.

ARGUMENT

INTRODUCTION

Petitioners, tax attorneys for one Bromley, sued to enjoin the Commissioner of Internal Revenue from enforcing by court action summonses served upon their accountants, Peat-Marwick, and in the alternative, asked that the summonses be declared void (R. 10–15). They contend that the Commissioner exceeded his statutory authority in issuing the summonses and that their enforcement would violate their rights and privileges under the Constitution and the common law, and also the rights of their client. They

also argue that they could not, without irreparable injury, await the statutory enforcement proceedings for a determination of these issues because their accountants will comply with the summons and, in any event, could not be expected to risk the criminal penalties prescribed for disobedience.

Our answer is that the Internal Revenue Code not only authorizes the Commissioner to issue summonses in aid of the determination or collection of a tax liability, but also provides an exclusive forum for challenging the correctness of his action or asserting any constitutional or other legal privileges of withholding the documents sought. Since the statutory procedure fully protects any rights of the person summoned, it meets all the requirements of the Constitution. Under these circumstances, petitioners' action is plainly a suit to enjoin the Commissioner's performance of his official duty to administer the revenue laws and is therefore barred by the doctrine of sovereign immunity as a suit against the United States without its consent. Wholly apart from the government's sovereign immunity, since petitioners have an adequate remedy at law in the enforcement proceedings and since they may take judicial action to avoid any possibility that Peat-Marwick will comply with the summonses in advance of such proceedings, the action would have to be dismissed for want of equity jurisdiction.

I

THE INTERNAL REVENUE CODE CONSTITUTIONALLY AUTHORIZES THE ISSUANCE OF ADMINISTRATIVE SUMMONSES IN AID OF THE DETERMINATION OR COLLECTION OF A TAX LIABILITY AND PROVIDES AN ADEQUATE AND EXCLUSIVE FORUM IN WHICH ANY PERSON AFFECTED MAY CHALLENGE THE VALIDITY OF THE SUMMONSES AND ASSERT ANY CONSTITUTIONAL RIGHTS

A. *The Code establishes a comprehensive scheme for the issuance of summonses by the Commissioner and a judicial test of their validity and constitutionality*

Section 7602 of the Internal Revenue Code of 1954 authorizes the Commissioner of Internal Revenue to summon any person to appear and produce books or records and give testimony "[f]or the purpose of ascertaining the correctness of any return, * * * determining the liability of any person for any internal revenue tax * * *, or collecting any such liability * * *." The Code also provides an orderly and adequate means by which persons affected may challenge the validity of the summons and assert any constitutional rights they may have to refuse or prevent compliance. Thus, the person is summoned "to appear before the Secretary or his delegate at a time and place named in the summons" (Section 7602(2)). On that occasion, the person may raise any objections he may have to the production of requested documents or to questions posed. Interested third parties may also appear and assert their rights to nondisclosure of documents or information.[2]

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[2] *Foster* v. *United States*, 265 F. 2d 183, 185 (C.A. 2), certiorari denied, 360 U.S. 912; *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122, 123 (C.A. 2), certiorari denied *sub nom. Cincotta* v. *United States*, 347 U.S. 960; *Corbin*

If the defenses raised to the summons are rejected by the Commissioner, the Code assures the person summoned a judicial test of his asserted rights by requiring the Commissioner to move for enforcement in a federal district court or before a United States Commissioner (Sections 7402(b), 7604(a) and 7604 (b), App., *infra*, pp. 55, 56–57). The Code gives the Commissioner of Internal Revenue no authority to enforce compliance or impose sanctions for noncompliance in administrative proceedings.

Specifically, Sections 7402(b) and 7604(a) grant to the federal district courts "jurisdiction by appropriate process" to compel compliance with a summons.[3] To invoke this jurisdiction the Commissioner generally proceeds by an application for an order to show cause why the person summoned should not be ordered to comply[4] or by a simple application for an order directing compliance.[5] Alternatively, Section 7604(b)

Deposit Bank of Corbin v. *United States*, 244 F. 2d 177 (C.A. 6); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 18 (C.A. 2) (concurring opinion), certiorari denied, 370 U.S. 918; Rule 24, Federal Rules of Civil Procedure.

[3] The Commissioner may also proceed under Section 7402(a) which grants to the district courts, "at the instance of the United States," the power "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." See *Brody* v. *United States*, 243 F. 2d 378, 384 (C.A. 1), certiorari denied, 354 U.S. 923.

[4] See, *e.g.*, *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (C.A. 6), certiorari denied, 348 U.S. 838; *Beatty* v. *United States*, 227 F. 2d 350 (C.A. 8); *Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9).

[5] See, *e.g.*, *O'Connor* v. *O'Connell*, 253 F. 2d 365 (C.A. 1); *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864.

(App., *infra*, p. 57) provides that upon a failure or refusal to comply, the Commissioner may apply to the district court or to a United States Commissioner for an attachment against the summoned person "as for a contempt" and "if satisfactory proof is made," the district judge or the Commissioner may order the "arrest of such person and upon his being brought before him to proceed to a hearing of the case * * *."*

Following the hearing which is required whether the Commissioner proceeds by way of Section 7402(b), 7604(a) or 7604(b), the judge or the United States Commissioner, if he finds the defenses unmeritorious, may issue an order for compliance with the summons. In addition, under Section 7604(b), which authorizes the court or the United States Commissioner "to make such order as he shall deem proper, not inconsistent

*The legislative history of the provision, first passed in 1864 (13 Stat. 226), indicates that Congress was greatly concerned about the delays which occurred in the collection of taxes. 65 Cong. Globe 2440-2441. By authorizing the Commissioner to apply for an "attachment * * * as for a contempt," the Congressional sponsors of the bill stated that it was their intention to provide for a summary and effective means (thereby minimizing delays) by which the court could acquire jurisdiction over the person summoned (*ibid.*). The provision which required "satisfactory proof be made" before the court could issue an attachment was deemed sufficient to protect the rights of the summoned person from administrative abuse. 65 Cong. Globe 2660-2661. Moreover, it was emphasized by the proponents of the bill that after an attachment was issued, the witness could assert his objections and privileges at the hearing before the court, who could then rule and make such order "as he shall deem proper." 66 Cong. Globe 2997. The proceeding by way of attachment was the only means of enforcement authorized until 1913, at which time Congress passed the predecessor of present Section 7604(a) (38 Stat. 179).

with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience," the witness may be ordered committed until such time as he complies with the summons. *McCrone* v. *United States*, 307 U.S. 61. It is clear, of course, that under "the law for the punishment of contempts" punishment for criminal contempt could be imposed only if the witness failed to obey the court order for compliance with the summons. *Brody* v. *United States*, *supra*.[7]

In the judicial enforcement proceedings, the person summoned may challenge the summons on any ground, including those urged here by petitioners—that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution (see, *e.g.*, *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9); *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904), and is protected by the attorney-client privilege. *Sale* v. *United States*, 238 F. 2d 682 (C.A. 8), certiorari denied, 350 U.S. 1006; *Bouschor* v. *United States*, 316 F. 2d 451 (C.A.

[7] In *Brody* (243 F. 2d at 381), the First Circuit stated: "Though this petition is entitled 'Petition for Attachment as for Contempt' and though a similar phrase is contained in § 7604(b), the proceeding was not strictly one of contempt, but was more accurately a proceeding to obtain the assistance of the court in forcing Brody to give the desired information to the Internal Revenue Service by the device of having the court issue an order to that effect, disobedience of which would be a contempt punishable by the court. * * * Brody could not have been punished summarily by the court for a contempt of court for his failure to obey the summons of the Internal Revenue Service."

8); *Chapman* v. *Goodman*, 219 F. 2d 802 (C.A. 9); *Commissioner* v. *Schwarz*, 247 F. 2d 70 (C.A. D.C.). The person summoned may, of course, also urge that enforcement of the summons would violate his constitutional rights, such as by compelling him to incriminate himself or subjecting him to an unreasonable search and seizure.[8] Finally, third persons who claim that enforcement of the summons would violate their rights, such as the owners of property who want to prevent its custodian from turning it over to the Commissioner, may intervene and fully present their claims to the court before the latter decides whether to order enforcement.

If the court or commissioner orders compliance, the person summoned—or an intervening third party—may obtain an appellate test of that order without risk of punishment for contempt. With the exception of the Seventh Circuit (*Application of Davis*, 303 F. 2d 601, certiorari granted, 371 U.S. 810, vacated as moot in 374 U.S. 495; *Jarecki* v. *Whetstone*, 192 F. 2d 121, 124), appellate courts have uniformly held that such an order is "final" and appealable since it marks the end of a proceeding begun against the witness. *O'Connor* v. *O'Connell*, 253 F. 2d 365–367 (C.A. 1); *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122, 123 (C.A. 2), certiorari denied, 347 U.S. 960; *Falsone* v. *United States*, 205 F. 2d 734, 737 (C.A. 5), certiorari denied, 346 U.S. 864; *Bouschor* v. *United States*, 316 F. 2d 451,

[8] *Bouschor* v. *United States*, 316 F. 2d 451, 457–459 (C.A. 8); *In re Turner*, 309 F. 2d 69 (C.A. 2); *Hubner* v. *Tucker*, 245 F. 2d 35 (C.A. 9).

454–455 (C.A. 8); *Martin v. Chandis Securities Co.*, 128 F. 2d 731, 734 (C.A. 9); *D. I. Operating Co.* v. *United States*, 321 F. 2d 586 (C.A. 9), decided August 22, 1963. Thus, with a stay of the order, the person summoned may have an appellate test of his rights before deciding whether to comply.

In addition to these proceedings for enforcement, a person who fails to comply with a summons may be subjected to criminal prosecution under Section 7210 (App., *infra*, p. 55) which provides as follows:

> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections * * * 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Although this section literally authorizes punishment upon conviction for mere neglect "to appear or to produce" in response to a summons, it is clear—from the only reported prosecution under this section or its predecessors—that wilfulness is an essential element of the offense. *United States* v. *Becker*, 259 F. 2d 869 (C.A. 2), certiorari denied, 358 U.S. 929.*

* The facts of this case show that Becker acted in outrageously bad faith in refusing to comply with the summons. He appeared in response to the summons and told the Service that the records called for had been destroyed. He was prosecuted only when he produced these same records, a year later, in response to a grand jury subpoena. See *United States* v. *Becker*, 58–1 U.S.T.C. par. 9403 (not officially reported).

There, the district court (58-1 U.S.T.C. at p. 68064)—

> construe[d] this word "neglect" as meaning something more than inadvertence. To make it a criminal offense to neglect in this situation would imply that he must have wilfully failed to comply with the summons with knowledge that a reasonable man should have had that he was failing to do what the summons requested him to do.

In our view, the requirement of wilfulness renders the section inapplicable to persons who appear on the return day of the summons and in good faith claim defenses as grounds for noncompliance even though those defenses may be held unmeritorious in later enforcement proceedings. Thus, if Peat-Marwick should appear in response to the summonses and decline to produce on grounds now being advanced by the petitioners, it would avoid any risk of prosecution under Section 7210. In short, a prosecution under this section, as noted by the court below, "would not follow from a good faith refusal to comply with a revenue summons" (R. 161). Of course, if a prosecution is brought, the person summoned may avoid conviction—whether or not he appeared on the return day—by showing that the summons was invalid or that compliance would have violated his constitutional rights. In sum, Section 7210 neither forecloses defenses nor compels any person to risk punishment in order to assert that the testimony or documents may not be required.

Thus, the Code not only gives the Commissioner authority to decide when to issue summonses but it also provides an orderly means of testing whether that authority has been properly exercised and whether persons affected have any constitutional right to withhold the evidence. The comprehensive nature of the statutory provisions by which Congress has provided for such a test indicates that it intended this to be the exclusive means for obtaining judicial review. There are no other provisions in the Code nor any indications in its legislative history to suggest that the Congress intended to recognize or allow any alternative means of obtaining such a test.[10] It is, of course, a familiar principle of statutory construction that where Congress has specified one remedy, this normally excludes any other. *United States* v. *Babcock*, 250 U.S. 328, 331. Further, as we shall show (*infra*, pp. 38–42), the delay and disruption of the public administration of the revenue laws incident to a suit to quash a summons are persuasive reasons why Congress excluded such procedures.

[10] We note, moreover, that solicitude for the prompt and orderly collection of the revenue has prompted Congress to curtail severely judicial intervention in tax proceedings. The Declaratory Judgment Act (28 U.S.C. 2201, Appendix, *infra*, p. 58), empowers the district courts to declare rights and other legal relations of interested parties "except with respect to Federal taxes." And Section 7421(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 55), with exceptions here pertinent only in that they demonstrate the stringent limitations of Congressional consent to suits against the United States in tax matters, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7–8.

B. The Code provisions authorizing the issuance and enforcement of revenue summonses and requiring all defenses to be set up under the statutory procedure are constitutional

Petitioners do not claim, and indeed we can conceive of no basis for a claim, that the Code provision pursuant to which the Commissioner issued the summonses is unconstitutional.

Turning to the enforcement provisions, the only possible basis for an attack upon their constitutionality would be the argument that the penalties risked by a refusal to comply with a summons are so severe that requiring taxpayers or witnesses to observe the statutory procedure amounts to a denial of judicial review and an attempt to make the decision of the Commissioner conclusive. *Ex parte Young*, 209 U.S. 123; *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331; see *St. Regis Paper Co.* v. *United States*, 368 U.S. 208.[11] The Court invoked the latter principle in *Young* and *Oklahoma Operating Co.*, which involved the issuance of rate regulations by State agencies under statutes which imposed severe penalties for noncompliance. Finding that if the parties concerned had waited for the State Attorney General to move for compliance before asserting their objections, they would have been subject to possible imprisonment (without regard to the element of wilfulness) and

[11] The liability to "ruinous" penalties explains the Court's ruling in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 226, that a person ordered by the Federal Trade Commission to file special reports pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b), may seek a judicial test of the order without awaiting the initiation of enforcement and penalty proceedings by the Attorney General.

would have risked the daily accrual of enormous fines, the Court held the enforcement provisions to be unconstitutional on the ground that the enterprises affected must be given a chance to test the validity of the regulations prior to incurring such risks. It stated (*Ex parte Young*, 209 U.S. at 147):

> * * * If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U.S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

The enforcement provisions of the Internal Revenue Code impose no such risks as a condition to a judicial test. Indeed, in our view, a person summoned who appears and in good faith claims his rights as grounds for noncompliance runs no risks of punishment whatever, even though the defense is unsound. The Commissioner has no power in administrative proceedings to punish a refusal to comply. True, there is a risk of "arrest" if the Commissioner pro-

ceeds for enforcement of a summons under Section 7604(b) by an application for "attachment * * * as for a contempt." However, it is clear that the possibility of such an arrest [12] is in no sense a threat of such a penalty sufficient to bring the case within *Young*—indeed it is no penalty at all. The most that the courts can do if they find the defense to the summons unmeritorious in the judicial enforcement proceedings is to issue an order for compliance and commit the person until he complies.[13] Punishment for contempt may, of course, be avoided by compliance or by a stay of the order pending appellate review. Nor does the possibility of criminal prosecution under Section 7210 of the Code in any sense threaten penalties of such magnitude as to amount to a constitutional denial of judicial review. The person summoned cannot be prosecuted if he appears and asserts his defense. See *supra*, pp. 21–22. Even if he could be convicted for refusing to comply without a court order, conviction carries neither the cumulative penalties or ruinous fines necessary to bring a case within the doctrine of *Ex parte Young*. Here the maximum penalty is a fine of $1,000 or imprisonment for one year, or both.

[12] To our knowledge, there are four reported cases in which the "attachment" powers conferred in this section were utilized. *Sale* v. *United States*, 228 F. 2d 682 (C.A. 8); *Brownson* v. *United States*, 32 F. 2d 844 (C.A. 8); *Jarecki* v. *Whetstone*, 192 F. 2d 121 (C.A. 7); *Tucker* v. *Hubner*, 129 F. Supp. 110 (S.D. Calif.), remanded, 245 F. 2d 35 (C.A. 9).

[13] In *Brownson* v. *United States*, 32 F. 2d 844 (C.A. 8), and *Tucker* v. *Hubner*, 129 F. Supp. 110 (S.D. Calif.), remanded 245 F. 2d 35 (C.A. 9), the courts coupled a compliance order under Section 7604(b) with an order of commitment for civil contempt.

This point is graphically illustrated in *In re Turner*, 309 F. 2d 69 (C.A. 2). There, the taxpayer, claiming that production would violate rights guaranteed to him by the Fourth and Fifth Amendments, brought suit to quash or modify a summons which commanded him to produce all his personal records of income and expenses. On appeal from the denial of relief, the taxpayer argued that the records would necessarily fall within his privilege against self-incrimination and that the court should therefore intervene *in limine* to prevent what would be futile compulsion. The court of appeals, although recognizing the probability that many of the documents would be protected from disclosure by the privilege, affirmed the order of the district court directing the taxpayer "to submit to the relatively slight burden of bringing his records to the hearing and making there any claim of privilege that may be warranted in light of what develops" (*id.* at 72).

C. *The provisions of the Code are applicable, and constitutional as applied, to summonses seeking the books or papers of a third person*

In the present case, the summonses seek to obtain from Peat-Marwick books and papers which petitioners claim are held by Peat-Marwick for them and for their client Bromley. We submit that this circumstance does not affect the adequacy and exclusivity of the opportunities the Code provides for setting up any available defenses.

It is doubtful whether Peat-Marwick has any rights to resist enforcement either in this suit or in defense of its refusal to comply, for the challenge to the sum-

monses asserts not their rights but the rights of others. Assuming that Peat-Marwick has standing, upon the return of the summonses before the Special Agent and later, if necessary, upon the application for an order to show cause or attachment for contempt, it may assert all the reasons for withholding the documents that petitioners seek to assert in this proceeding.

Petitioners allege in their complaint that "enforcement and compliance with each purported 'Summons'" would constitute a violation of their client Bromley's privilege against self-incrimination and right to due process of law under the Fifth Amendment to the Constitution (R. 8–10). Again, it is hard to see how petitioners, who are not even in possession of the papers, can assert the constitutional privileges of Bromley in either this or any other proceeding but if they can, they have at least as good a right before the Special Agent and in any subsequent enforcement proceedings as they have here.

To put the point another way, even if we assume that the Commissioner would be denied relief by the district court in any future enforcement action on the ground that Bromley's rights and privileges would be infringed, this is only to say that petitioners would thereby have stated a valid defense to any such action. The mere commencement of such a suit by the Commissioner can in no sense amount to a violation either of Bromley's constitutional rights or his common-law privileges.

There remains the possibility that Peat-Marwick might voluntarily turn the papers over to the Commissioner instead of waiting for the return day, when both petitioners and Bromley would have a chance to be heard. One answer is that Peat-Marwick apparently has no intention of turning over the papers unless coerced by legal proceedings; Peat-Marwick did not admit the allegation of its intent (R. 110). A second answer is that anyone who entrusts his papers to another assumes the risk that the bailee will give them to another. Third, and most important, either petitioners or Bromley are free to bring an action against Peat-Marwick to compel Peat-Marwick to respect any rights the complainants have in the papers, subject only to Peat-Marwick's duty to comply with any valid court order enforcing the Commissioner's summonses. That would bar voluntary surrender and force a proceeding under the Code in which petitioners and Bromley could intervene and assert their respective rights.

Since the Code thus provides full opportunity to obtain a judicial ruling before any coercive sanctions are imposed, remitting all parties to the statutory procedure works no injustice and violates no constitutional rights.

Application of Colton, 291 F.2d 487 (C.A. 2), is contrary to our position whether the decision rested upon constitutional grounds as the citation of *Ex parte Young* seemed to suggest or upon some notion "inherent in the statutory scheme," as explained by

Judge Friendly in his subsequent opinion in *In re Turner*, 309 F. 2d 69, 72. Colton, an attorney—who had been subpoenaed to testify and produce papers pertaining to the tax liability of a client—had moved to quash the subpoena on the grounds that it called for information protected by the attorney-client privilege. The court, being of the view that the claim of privilege could not be tested in the course of enforcement proceedings without risking criminal penalties for disobedience under Section 7210 of the Code and possibly a contempt citation under Section 7604(b),[14] held that the action was against the Commissioner as an individual under the doctrine of *Ex parte Young*. We have stated above our reasons for concluding that the predicate of the decision was a mistaken understanding of Section 7210 and 7604(b). Unfortunately the government failed to explain in *Colton*, in either its brief or oral argument, that Section 7604(b) provides for enforcement only where the summons has been upheld after a hearing, and that neither Section 7604(b) nor Section 7210 sanctions punishment of one who responds to the summons in good faith but refuses to give evidence as a method of challenging its enforceibility. See *supra*, pp. 17–22.[15]

In Re Turner, 309 F. 2d 69, 72, which was written by the same judge, greatly weakens the authority of

[14] The court's statement regarding the scope of Section 7604 (b) is contrary to the First Circuit's interpretation of that section in *Brody v. United States*, 243 F. 2d 378, 381 (C.A. 1), certiorari denied, 354 U.S. 923. See, *supra*, n. 7.

[15] See also 75 Harv. L. Rev. 1222; 32 Fordham L. Rev. 147, 149.

Application of Colton, for Turner apparently could have made every argument about the danger of prosecution under section 7210 that was made by Colton. Nevertheless, the court held that Turner could not obtain an order quashing a summons upon the ground that the books, records and papers covered by the summons would fall within the privilege against self-incrimination; that defense, the court held, should be made upon return of the summons and in any enforcement proceeding.

II

SINCE THE COMMISSIONER ACTED WITHIN HIS STATUTORY AND CONSTITUTIONAL AUTHORITY, THE COMPLAINT SHOULD BE DISMISSED AS A SUIT AGAINST THE UNITED STATES WITHOUT ITS CONSENT

The statutory arrangement for the issuance and enforcement of administrative summonses in aid of the revenues cannot be circumvented by an action for an injunction against the Commissioner. The issuance of such a summons is part of the Commissioner's official duties. His action in the performance of such duties is the action of the United States. An action to bar him is an action against the United States which is barred by the doctrine of sovereign immunity as an unconsented suit.[16]

[16] As authority for the district court to hear their complaint, petitioners rely (R. 2) upon 28 U.S.C. 1340 (App., *infra*, p. 57), which grants to the district courts "original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue * * *." It is clear, however, that Section 1340 does not purport to be a consent to actions against the

A. This suit is barred by sovereign immunity because the relief sought would interfere with the public administration and would prevent the government from conducting an investigation authorized by the Internal Revenue Code

Whether a suit, although nominally directed against an individual officer, is in substance one against the United States is determined by "the essential nature and effect of the proceeding." *Ex parte New York*, 256 U.S. 490, 500, 502. Petitioners, in their complaint, do not purport to seek relief against respondent Caplin as an individual or private person. Rather, the complaint is directed against Caplin solely "in his capacity as Commissioner of Internal Revenue" (R. 3), and seeks to bind him in that capacity as well as his agents and successors in office (R. 14). The aim of the litigation is to protect the interests of the taxpayer Bromley from allegedly wrongful governmental action. Thus, the "essential nature" of the action is an attempt to restrain the Commissioner, in his official capacity, from enforcing the summonses.[17]

United States. *DeMasters* v. *Arend*, 313 F. 2d 79, 84 (C.A. 9), pending on petition for certiorari, No. 159, this Term; *First National Bank of Emlenton, Pa.* v. *United States*, 265 F. 2d 297, 299 (C.A. 3).

[17] The fact that petitioners also named Peat-Marwick as defendants—allegedly on the ground that the accounting firm would attempt to comply with the summonses so as not to risk attachment for contempt (R. 10, 40)—does not change the nature of the suit insofar as the immunity of the United States is concerned. Further, notwithstanding the request for an order enjoining Peat-Marwick from appearing or testifying or allowing examination of any records (R. 13), the action is essentially one for relief against the Commissioner. Thus, as the court of appeals observed, the "true position of [Peat-Marwick] is that of plaintiffs, although nominally they appear

In holding that such a suit is one against the United States to which it had not consented, the court below correctly applied the principles enunciated in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, reaffirmed in *Malone* v. *Bowdoin*, 369 U.S. 643, and recently reiterated in *Dugan* v. *Rank*, 372 U.S. 609. The suit is against the sovereign if "the judgment sought would * * * interfere with the public administration" or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act" (*id.* at 620). The relief here, if granted, would clearly fall within both categories. It would restrain the Commissioner from enforcing the summonses in aid of his statutory duty under Section 7602 of the Code (App., *infra*, 56) to ascertain and collect the correct tax liability of Bromley and his numerous enterprises. It would mean that he could not move to compel the production of the documents sought by the summonses nor to elicit testimony from Peat-Marwick relating to Bromley's tax liability. To grant the relief would in short accomplish precisely what this Court said could not be done to the sovereign, without its consent: The government's investigation would be "stopped in its tracks." *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. at 704.

We reject, as without foundation, petitioners' suggestion (Br. 9, 12) that the doctrine of sovereign immunity applies only to cases which involve property in

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as defendants" (R. 161). This is clearly revealed by Peat-Marwick's answer, in which it contested the right of the government to compel enforcement of the summonses and joined with petitioners in their prayer for relief (R. 107–111).

the hands of a government official. The controlling consideration is not the subject matter of the suit, but the effect which granting the relief sought would have upon the sovereign. Where, as here, the relief sought would operate against the sovereign and interfere with the public administration, suits against government officials have frequently been held to be barred as suits against the United States, even though property was not involved.[18]

B. *This suit cannot be construed as one against the Commissioner as an individual*

We recognize, of course, that, (1) if the Commissioner exceeds his statutory authority or (2) if that authority or its exercise is constitutionally void, he may be sued as an individual without the defense of sovereign immunity.[19] Neither exception is applicable here.

(1) Petitioners claim that the Commissioner acted "outside" his statutory authority in issuing the summonses for an unauthorized purpose (Br. 12–13). Their contention, which was not spelled out in their

[18] See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (setting tariff rates); *Rogers* v. *Skinner*, 201 F. 2d 521, 524 (C.A. 5) (official action of Regional Director of Wage-Hour Division); *Ainsworth* v. *Barn Ballroom Co.*, 157 F. 2d 97 (C.A. 4) ("off-limits" order of commander of military base); *Harper* v. *Jones*, 195 F. 2d 705 (C.A. 10) (same).

[19] A suit for specific relief may be maintained against a federal officer as an individual where the acts complained of are "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." *Larson* v. *Domes-*

complaint,[20] is that the summonses were not issued for the purpose of ascertaining their client's correct tax liability or for any other purpose authorized by Section 7602 of the Code. Rather, they argue that the Commissioner issued the summonses for the following (allegedly unlawful) purposes: (a) to procure their trial preparation for use in the then pending Tax Court litigation involving their client, Bromley; and (b) to obtain evidence which may be used in a possible criminal prosecution against Bromley. Were the questions here we would show that the Commissioner is empowered by Section 7602 to issue summonses for the purpose of obtaining information for use in connection with a pending Tax Court case.[21] *Norda Essential Oil & Chemical Co.* v. *United States*, 253 F. 2d 700 (C.A. 2); *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2). Nor is it a defense to a summons that the evidence might be ultimately used in a criminal proceeding.

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tic & Foreign Corp., 337 U.S. at 702; *Malone* v. *Bowdoin*, 369 U.S. at 647; *Dugan* v. *Rank*, 372 U.S. at 621–622.

[20] In their complaint, petitioners alleged (R. 7–8) that the summonses purport "to have been issued under color of authority of Section 7602 of the Internal Revenue Code of 1954" and that "[e]ach such purported 'Summons' is illegal on its face."

[21] The Tax Court cases involved Bromley's individual liabilities for the years 1953–1956 (R. 5, 17), whereas the summonses pertained only to Bromley's individual liabilities for the years 1957–1959 and corporate liabilities for the years 1953–1959 (R. 19–40). The trial of the Tax Court cases ended over sixteen months ago, and they are now awaiting decision. See Application for Stay of Mandate of Court of Appeals (p. 8), filed in this Court on March 20, 1963, and denied by the Chief Justice on March 23, 1963.

In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12, 14–17 (C.A. 2), certiorari denied, 370 U.S. 918; *In re Turner*, 309 F. 2d 69 (C.A. 2); *Lash* v. *Nighosian*, 273 F. 2d 185, 187–188 (C.A. 1), certiorari denied, 362 U.S. 904; *Boren* v. *Tucker*, 239 F. 2d 767, 772–773 (C.A. 9).[22]

But those questions are not to be decided here. Even if petitioner were right, the argument is merely that the Commissioner's action is based upon "an incorrect decision as to law" with respect to his powers of enforcement, and this is not enough to avoid the bar of sovereign immunity. *Larson* v. *Domestic & Foreign Corp.*, *supra*, at 695. Petitioner has not made, and could not make, the required "affirmative allegation of any relevant statutory limitation upon the [Commissioner's] powers" to issue summonses (*Malone* v. *Bowdoin*, 369 U.S. 643, 647). The Commissioner's authority is not merely to issue summonses that are in truth enforcible because they are ultimately found to conform to the statute and invade no constitutional or other legal privilege or immunity. The Commissioner is given power to act when he believes that a summons is proper and that the testimony or production of documents may be required. His authority to decide, and to act upon his decision, is not vitiated by proof that his decision, while bona

[22] *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), upon which petitioners rely (Br. 34–35), is inapposite, for there the government admitted that a primary purpose of the summons was to support a criminal prosecution in which an indictment had already been returned. The *O'Connor* case has been so distinguished in *Boren* (239 F. 2d at 772–773), *Lash* (273 F. 2d at 188) and *Magnus* (311 F. 2d at 15).

fide, was erroneous. A claim of error in the exercise of the delegated power is not sufficient to render the Commissioner's action *ultra vires* for the power is to decide when to issue or not issue such summonses. See *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 689–690, 692–695. As the Court said in the *Larson* case (p. 695):

> [W]e have heretofore rejected the argument that official action is invalid if based upon an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.

Any error by the Commissioner in issuing an improper summons may be corrected under the procedure provided by the Code.

DeMasters v. *Arend*, 313 F. 2d 79 (C.A. 9), pending on petition for certiorari, No. 159, this Term, decides nothing to the contrary. The court took as its premise the proposition that, "if appellants were indeed prohibited by Section 7605(b) or the Fourth Amendment from initiating this inquiry, a suit to restrain their unlawful conduct would not be barred by the doctrine of soverign immunity" (*id.* at 85). Section 7605(b) prohibits subjecting a taxpayer to "unnecessary examination or investigations" and permits only one inspection for each taxable year unless the Secretary finds a second to be necessary. The Ninth Circuit evidently assumed that those provisions operate as statutory limitations upon the Commissioner's power even to initiate an investigation, and the court then held that the Commissioner had complied with the provisions. We need not quarrel with

that assumption insofar as the instant case is concerned. Petitioners' objections to responding to the summonses rest upon altogether different grounds. The willingness of the Ninth Circuit to examine on its merits the claim of a violation of the Fourth Amendment seems inconsistent with our submission but since the court brushed the claim aside on its merits, the distinction upon the jurisdictional issue was hardly important. In any event, the case is not controlling here.

(2) There is no basis for a claim that the doctrine of sovereign immunity is inapplicable because the statute conferring upon the Commissioner the power to issue summonses is unconstitutional, or because he has exercised his power in an unconstitutional manner. In fact, petitioners do not directly attack the constitutionality of the sections of the Code which authorize the issuance of revenue summonses, enforcement thereof and penalties for refusal to comply (see 26 U.S.C. 7602, 7604, 7210; App., *infra*, pp. 55, 56–57). Nor does the complaint allege that the Commissioner has violated anyone's rights—constitutional or otherwise—by issuance of the summonses. If turning over the papers would invade Bromley's privilege against self-incrimination, the constitutional privilege can be asserted under the statutory procedure which is fully adequate for the protection of any right petitioners could assert in this proceeding.

C. Practical considerations of tax administration show the need for invoking the doctrine of sovereign immunity

The question presented by this case is not whether petitioners or their client Bromley shall be compelled

to turn over papers that are privileged or otherwise beyond the Commissioner's right to scrutinize. The question is whether the petitioners can stop the government in its tracks by an early, independent action instead of raising all proper objections at the hearing before the Special Agent upon return of the summonses and later, if necessary, as defenses to proceedings for enforcement. The admonition in *Decatur* v. *Paulding,* 14 Pet. 497, 516—that "the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief"—applies with full force to premature interference with the initial phases of tax investigations.

First, it is axiomatic that a court will not assume jurisdiction unless there exists a justiciable "case or controversy" to be resolved. Where a person summoned appears in response thereto, and refuses to testify or produce documents on the ground that to do so would infringe certain rights and privileges, the Commissioner might well agree or conclude that the requested information is not sufficiently important to warrant further action. If so, that would be the end of the matter. An action to restrain enforcement of a summons, therefore, compels a court to take jurisdiction over a case that might never go to litigation if the complainant asserted his claims under the statutory procedure.

Second, assuming that the matter is serious enough to justify the commencement of a court proceeding, it is essential that the questions called for resolution be ripe for adjudication. Petitioners' action, commenced

before the Commissioner has had an opportunity in administrative proceedings to pose particular questions or request the production of specific documents, must inevitably prevent the development of the very factual basis which is needed to determine whether legal rights either exist or are threatened. *In re Turner, supra; Landy* v. *United States,* 283 F. 2d 303 (C.A. 5), certiorari denied, 365 U.S. 845; *Application of Burr,* 171 F. Supp. 448 (S.D. N.Y.). As the court below observed, the rights and privileges asserted by petitioners (and Peat-Marwick) with respect to the compulsion of these documents and such testimony "cannot definitely be known" "until these proceedings take form" (R. 160). This observation underscores the wisdom of the rule that a person summoned in investigative proceedings cannot ask courts to intervene *in limine,* but must first appear, bring the documents "into the presence of [the interrogator] (i.e., stop short of inspection) * * *," and then assert his privileges and objections as particular questions are asked and specific documents are requested. *Chapman* v. *Goodman,* 219 F. 2d 802, 806 (C.A. 9); *In re Turner,* 309 F. 2d at 71–72. See also *Rogers* v. *United States,* 340 U.S. 367, 374; *Hoffman* v. *United States,* 341 U.S. 479, 486–487; VIII Wigmore, *Evidence,* Sec. 2268, pp. 405–406 (McNaughton rev. 1961).

Petitioners' injunction suit, like any suit to quash a summons, wastes time and unnecessarily burdens the courts as well as the executive. Generally, the entertainment of a suit to enjoin enforcement of or to quash a revenue summons adds an extra round of trial and appellate proceedings to those otherwise

required in the enforcement process. Thus, the question raised by petitioners' suit is solely whether Peat-Marwick can be summoned to testify or produce documents in the first instance. If this broad question were decided affirmatively, it would not resolve any of the potential objections to answering specific questions or producing particular documents which may become the subject of later enforcement proceedings. The ensuing delay in the public administration of the tax laws may be measured in terms of years, as is shown by the subsequent history of the *Colton* case (201 F. Supp. 13 (S.D.N.Y.), affirmed 306 F. 2d 633 (C.A. 2), certiorari denied, 371 U.S. 951) and the dreary pattern of dilatory litigation and delays spawned thereby. See, *e.g., In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12 (C.A. 2), certiorari denied, 370 U.S. 918; *In re Turner, supra.*[23] These delays and fragmented proceedings are avoided by application of the doctrine of sovereign immunity which leaves the summoned parties to pursue the prescribed administrative process with appeal to the courts available therefrom.

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[23] An egregious example of the resulting appalling waste of judicial time and energy is *In Re Magnus, Mabee & Reynard, Inc., supra*, where two full rounds of appeal and certiorari proceedings occurred, halting a tax investigation for about two years. As the Second Circuit there observed (311 F. 2d at 13–14):

> This is the second time these summonses have been before this court on a motion to quash. The first attack on the summonses was made by the taxpayers who moved to quash the summonses on June 29, 1961. Their application was denied by Judge Dimock on July 14, 1961, and reargument was denied (D.C., 196 F. Supp. 127). The tax-

We shall now show in more detail that the denial of jurisdiction works no significant hardship or injustice upon the petitioners who have a fully adequate remedy at law in the course of judicial enforcement proceedings to protect their alleged rights and those of their client to nondisclosure of the documents.

III

SINCE PETITIONERS' RIGHTS MAY BE ASSERTED IN DEFENSE OF ANY PROCEEDING TO ENFORCE THE SUMMONSES OR PUNISH VIOLATION, THE COMPLAINT SHOULD BE DISMISSED FOR WANT OF EQUITY

It is fundamental that the "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres* v. *Westover*, 359 U.S. 500, 506–507. To justify the grant of such relief, "the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear." *Douglas* v. *Jeannette*, 319 U.S. 157; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151,

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payers appealed. The decision below was affirmed in an opinion by this Court on February 13, 1962. (2 Cir., 299 F. 2d 335). Petitions for rehearing and rehearing *in banc* were denied. A stay was granted on April 4, 1962, by Mr. Justice Harlan pending application for a writ of certiorari. On April 10, 1962, ten months after the summonses were originally issued, an indictment was filed charging Percy Magnus with tax evasion and failure to file returns. Thereafter, certiorari was denied by the Supreme Court on June 11, 1962 (370 U.S. 918, 82 S. Ct. 1556, 8 L. Ed. 2d 499). The corporation then sought on July 17, 1962, to stay enforcement and quash the summons directed to it, and the taxpayer Percy C. Magnus sought similar relief against the summons directed to the accountants. Both applications were denied in an opinion by Judge Dimock on September 19, 1962, and it is this ruling that is the subject of this appeal.

162. In our view, these well established propositions are a complete bar—independent of the government's sovereign immunity—to this action.

Petitioners urge (Br. 20–21) that they are entitled to relief because (1) Peat-Marwick "intended to comply with the subpoena, thus obviating any further enforcement action by respondent-Commissioner"; and (2) "even had there been refusal and subsequent enforcement action, no hearing or remedy would have been assured under Sec. 7604 without clear and present danger of arrest and attachment * * * [and] [i]n an extreme case even criminal proceedings under Sec. 7210 might have been brought."

As to the first ground, it is far from clear that Peat-Marwick would comply with the summonses; moreover, if there were a real threat of such compliance, petitioners could fully protect themselves by suing Peat-Marwick to enjoin it from complying unless and until ordered to do so by a court of competent jurisdiction. The relevancy of the second point is unclear. If it is merely an additional reason why Peat-Marwick would be likely to comply, our answers to the first ground are dispositive. If, on the other hand, petitioners are suggesting that they may enjoin enforcement of the summonses because of the threat of criminal prosecution of Peat-Marwick if the latter fails to comply, the short answer is that this is a claim which may be made only by Peat-Marwick and not by petitioners. For it is axiomatic that one may sue to protect only one's own rights, and not the rights of third persons. Finally, we shall show that, even if

it be assumed that petitioners, because of their relationship with Peat-Marwick, may assert the latter's rights as a basis for injunctive relief, the remote possibility that penalties might be imposed upon Peat-Marwick for its refusal to comply does not warrant the exercise of equity jurisdiction to enjoin enforcement of the summonses.

A. *The possibility that Peat-Marwick may attempt to comply with the summonses does not afford a basis for jurisdiction of this suit to enjoin their enforcement*

Petitioners assert in their complaint (R. 10) that the intention of Peat-Marwick to attempt to comply with the summonses prior to any enforcement proceedings threatens them with irreparable harm in that the Commissioner would appropriate their trial preparation for use in the then pending Tax Court litigation involving their client Bromley, and would otherwise use this information in violation of Bromley's constitutional rights. We submit that petitioners' remedies at law are adequate to protect their rights and that these allegations do not warrant the intervention of a federal court of equity.

In the first place, at the time of the district court's dismissal of the complaint the pleadings did not, as petitioners assert (Br. 5), contain an unqualified allegation that Peat-Marwick had expressed an intention to comply with the summonses. Peat-Marwick is, as the court below pointed out (R. 161), although nominally a party defendant, in reality on the same side as petitioners themselves. Peat-Marwick's answer (R. 107–111) admitted all but one of the allega-

tions of the complaint; and it joined in petitioners' prayer that the Commissioner be enjoined from instituting enforcement and that Peat-Marwick, itself, be enjoined from compliance. It is true that petitioners alleged, upon information and belief, that Peat-Marwick would attempt to comply with the summonses unless compliance and enforcement were stayed by court order (R. 10). But Peat-Marwick's answer carefully avoided any admission of this allegation. It did not admit that it had *informed* petitioners that it would comply in the absence of a court order. And it did not admit that is *would* comply. It simply stated that "*if* the mentioned Summonses are complied with and will have to be complied with, * * * [Peat-Marwick] will be called upon to deliver up" documents belonging to petitioners which could compromise their preparation for trial of the Tax Court cases (R. 110, emphasis supplied). This is far from an admission that there will be voluntary compliance; in fact, the implication of the phrase "will have to be complied with" is that Peat-Marwick will *not* comply unless compelled by court order. Where petitioners and Peat-Marwick seek identical equitable relief, where petitioners have alleged that Peat-Marwick is their employee (R. 5–6, Br. 36),[24] and where Peat-Marwick fails to support the allegation of compliance, we submit that no clear showing has been made of a need for equitable relief and that substantial justice

[24] Indeed, for purposes of their position on the merits, petitioners represent that Peat-Marwick "worked for [them] just as if they were their own employees; clerks or stenographers working in their own offices." (R. 116; Br. 36.)

would be done by dismissal of the complaint for want of equity. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151.

Furthermore, even if the allegation as to voluntary compliance by Peat-Marwick be taken at face value, petitioners would still not be entitled to relief against the Commissioner. Petitioners could have adequately protected their rights without resorting to an action against the Commissioner of Internal Revenue by a simple action for an injunction against Peat-Marwick to prevent compliance with the summonses until so ordered by a court of competent jurisdiction. *Federal Trade Commission* v. *St. Regis Paper Co.*, 304 F. 2d 731 (C.A. 7). Further, in our view, such an order would eliminate for Peat-Marwick any risk that a refusal to comply might be regarded as evidence of bad faith warranting an application for attachment under Section 7604(b) or prosecution under Section 7210.

Finally, when they turned over the documents to Peat-Marwick, petitioners, at least to some degree, assumed the risk that their agent might, contrary to their instructions, choose to disclose them in response to a revenue summons.

B. *The remote possibility that Peat-Marwick may be subjected to penalties if it fails to comply with the summonses does not warrant the exercise of equity jurisdiction to enjoin enforcement at petitioners' suit.*

(1) The summonses are directed solely to Peat-Marwick, and it is only the latter, and not petitioners, who could possibly be subject to any penalties for noncompliance. While Peat-Marwick's answer to the

complaint joined in petitioners' prayer for relief, and while Peat-Marwick's interests may be closely aligned with petitioners', petitioners' argument in this Court is that the enforcement proceedings would provide an inadequate forum in which to test the validity of the summonses because of the possible penalties for noncompliance to which Peat-Marwick might be subjected if the summonses are upheld. In short, petitioners are attempting to invoke the aid of a court of equity because of an alleged threat of irreparable injury not to themselves, but to someone else, *i.e.*, the possibility that Peat-Marwick might not have an adequate opportunity to test the summonses in the enforcement proceedings. It is axiomatic, however, that a litigant may assert only his own rights, and not those of another. Petitioners have shown no basis for invoking equity jurisdiction, since they have failed to show that any rights *they* may have to contest the summonses could not be adequately protected in the proceedings before the Special Agent and, if necessary, in the enforcement proceedings in the courts.

We think that this is a complete answer to petitioners' contention that the enforcement proceedings would not provide an adequate opportunity for them to test the summonses. But since petitioners may be suggesting that their relationship with Peat-Marwick somehow entitles them to assert the latter's rights as a basis for equitable relief, we now show that in any event the possibility that Peat-Marwick may be subjected to penalties for non-compliance is so remote that it cannot form the basis for equitable relief.

(2) Petitioners argue that Peat-Marwick is unable to test out its objections to the Commissioner's summonses under this statutory framework without running the risk of arrest and attachment, and even possibly criminal proceedings under Section 7210, if the summonses are upheld. We have shown already that Section 7210, properly construed, will not support a prosecution against one who appears in response to a summons and asserts his objections. In that event an application for enforcement is the only sanction. See *supra*, pp. 17–22. In addition, a close examination of the statutory provisions and their administration by the Commissioner[25] shows that the practical risks of a refusal to comply are nil, provided Peat-Marwick appears in response to the summonses and claims its defenses. The possibility of an "arrest" if the Commissioner proceeds under the seldom used procedures of Section 7604(b) is not the threat of irreparable harm sufficient to warrant the intervention of a court of equity. Any fear of a contempt order or

[25] As set forth (*supra*, pp. 16–22), the statutory scheme for issuance and enforcement of a revenue summons is as follows: The Commissioner may issue summonses for stated purposes (Section 7602). Persons summoned to appear before the Commissioner may at that time raise all legal and constitutional objections to questions asked or the production of requested documents. In the event the Commissioner rejects the grounds of objection he must move in the federal district courts for an order compelling compliance under Sections 7402(b), 7604(a) or 7604(b). Prior to the issuance of such an order, the party summoned is afforded a full hearing upon his objections. Consistent with the law of contempts, failure to comply with such an order may be punished as a criminal or civil contempt. Finally, Section 7210 authorizes criminal prosecution of a person who fails to appear in response to the summons.

a criminal prosecution is more imaginary than real. Assuming petitioners may assert Peat-Marwick's rights, they would have an entirely adequate remedy at law as an intervenor in the Commissioner's enforcement action against Peat-Marwick. Moreover, even if it be conceded that Section 7210 presents the *possibility* of prosecution despite the invocation of a privilege in good faith,[26] a court of equity will not intervene where the party concerned has an adequate remedy at law by way of a defense to the criminal action. *In re Sawyer*, 124 U.S. 200; *Truax* v. *Raich*, 239 U.S. 33.[27] This rule has been applied even where the criminal statute is alleged to be unconstitutional. *Spielman*

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[26] We refer to the fact that the party summoned would still bear the risk that the Commissioner and the responsible officials in the Department of Justice might later take the view that the assertion of privilege was not, in fact, in good faith, and therefore initiate criminal proceedings.

[27] Cf. *Federal Power Comm'n* v. *Edison Co.*, 304 U.S. 375, 383, 386–387 (order of Federal Power Commission to produce books and records not reviewable in court of appeals since it is only preliminary in nature; to authorize review of such an order would afford "opportunity for constant delays in the course of the administrative proceeding * * *"; respondents deemed to have "full opportunity to contest" the validity of the order during enforcement proceedings or in a defense to a criminal prosecution wherein the "qualification that the refusal must be 'willful' fully protects one whose refusal is made in good faith * * *"). Compare the decision in *Federal Trade Commission* v. *Millers' Nat. Federation*, 23 F. 2d 968, 972 (C.A. D.C.) with the later decision in the same case at 47 F. 2d 428, 429–430 (C.A. D.C.). See also *Pauling* v. *Eastland*, 288 F. 2d 126, 130 (C.A. D.C.), certiorari denied, 364 U.S. 900 (federal court is without jurisdiction to enjoin enforcement of order of Senate Subcommittee to produce certain documents; proper time to pass on validity of such an order is on appeal from a conviction for failure to comply).

Motor Co. v. *Dodge*, 295 U.S. 89, 95; *Watson* v. *Buck*, 313 U.S. 387, 401; *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 98–99.

In the instant case, it is clear that Peat-Marwick—even if it chose to engage in a course of conduct which approached a violation of the criminal statute—would incur no risk of financial loss by way of ruinous or severe penalties. This is a *fortiori* true of petitioners who run no risk whatever.

The short of it is that if and when the Commissioner seeks enforcement of the summonses here involved, Peat-Marwick (and petitioners claiming through them) will have ample opportunity to test the validity of their claims without irreparable harm. When one considers the resulting delay, unnecessary burdens upon the courts and disruption in the administration of the revenue laws, the virtually nonexistent risks incident to such a test shrink still smaller as an alleged basis for equity jurisdiction.

IV

ASSUMING THAT THE PRESENT ACTION IS HELD TO BE MAINTAINABLE, IT SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER DEVELOPMENT OF PETITIONERS' FACTUAL CONTENTIONS

If this Court should hold that the present action is maintainable, we agree with petitioners (Br. 38–39) that the case should be remanded to the district court for a hearing on the merits of their complaint for a permanent injunction. Since in such circumstances the Commissioner would continue to refrain from instituting an enforcement action pending disposition

of the case on remand,[28] there would be no occasion for further action upon petitioners' request for a preliminary injunction.[29]

Apart from the question whether this suit is maintainable at all, the only other issues before the Court are whether the district court correctly dismissed the complaint on the grounds that petitioners had no "standing to sue" and had "failed to state a cause of action upon which relief can be granted" (R. 149).

In holding that petitioners had no standing to sue, the district court apparently took the view that petitioners had failed to allege a sufficient property interest in the documents covered by the summonses. While there is some basis for such a holding (see

[28] Although the Chief Justice, on March 23, 1963, refused petitioners' request to stay the enforcement of the summonses pending the filing of a petition for a writ of certiorari, the Commissioner has voluntarily refrained from such action during the pendency of the litigation.

[29] In this connection, the history of this case graphically demonstrates the delays and disruption of the administration of the revenue laws which would result if jurisdiction of such equity actions were upheld. Petitioners have now forestalled the government's investigation for almost two and one-half years. The summonses were served upon Peat-Marwick on June 13, 1961. This has rendered substantially moot any issue relating to the government's alleged effort to obtain the results of petitioners' preparations for the trial of the Tax Court cases. This trial ended some 16 months ago and is now awaiting decision. Moreover, the running of the six-year statute of limitations for criminal purposes may yet result in mooting another of petitioners' objections—that the information was allegedly sought for purposes of making a criminal case against the taxpayer, Bromley. Section 6531, Internal Revenue Code of 1954. The fact remains that the Internal Revenue Service has to date been unable to ascertain the correct tax liability of Bromley and his numerous organizations.

statement, *supra*, p. 6), we believe that the allegations of petitioners' complaint and accompanying affidavit (R. 6, 44) are sufficient to support their contention that the documents involved rightfully belonged to them, or to their client, Bromley, and were being held by Peat-Marwick only in its capacity as petitioners' employee. Moreover, since Peat-Marwick's position, as pointed out by the court of appeals, is in reality that of a plaintiff seeking the same relief as petitioners (R. 161), we think it apparent that the pleadings, as so construed, allege the requisite property interest in the summoned documents to satisfy the requirement of standing.

It further appears that, if our objections based upon sovereign immunity and the adequacy of the statutory remedy are overruled, the allegations of petitioners' complaint are sufficient to state a cause of action which—if proved—would entitle them to relief. Thus, allegations, such as those made by petitioners (R. 9, 43), that documents have been summoned for an improper purpose and are in any event protected by the attorney-client privilege have been upheld as grounds for nonproduction. See, *e.g.*, *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass.); *Commissioner* v. *Schwarz*, 247 F. 2d 70 (C.A. D.C.). But at the hearing on petitioners' motion for a preliminary injunction and on the government's motion to dismiss the complaint, no testimony was offered, either by petitioners, Peat-Marwick, or the client Bromley, with respect to these issues. Whether the documents involved in fact contained confidential communications

by the client Bromley (Pet. Br. 36) or whether they reflected petitioners' "mental impressions and ideas" under the rationale of the work product rule, can be determined only after a hearing (Br. 37–38).[30]

[30] For the sake of clarity, we point out that petitioners err in their contention (Br. 24) that the summonses also sought the individual records of the taxpayer Bromley. Petitioners devote much argument (Br. 25–31) to the proposition that such records are protected by the Fifth Amendment even in the hands of Peat-Marwick. This is not an issue in the case, since the summonses in fact do not seek the personal records of Bromley, but only of certain domestic and foreign corporations (R. 19–40). It is true, as petitioners contend (Br. 35), that there is authority for the proposition that the Fifth Amendment protects against the production of books of a foreign corporation which are held "in a purely personal capacity." *Application of Daniels*, 140 F. Supp. 322, 326–328 (S.D. N.Y.). Whether these records were so held by Bromley would be a proper question for exploration on remand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed. But if the Court should hold that the present action is maintainable, the case should be remanded to the district court for a hearing on the merits of petitioners' complaint for a permanent injunction.

Respectfully submitted,

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NOVEMBER 1963.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7210. FAILURE TO OBEY SUMMONS.

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

* * * * *

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

* * * * *

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court.

If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such

attendance, testimony, or production of books, papers, records, or other data.

(b). Enforcement.

Whenever any person summoned under sections 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

Title 28 United States Code:

SEC. 1340. INTERNAL REVENUE; CUSTOMS DUTIES.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

* * * * *

SEC. 2201. CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal

taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 119

SAMUEL REISMAN and CHARLES M. TRAMMELL, BERT B. RAND, HANS A. NATHAN, d/b/a TRAMMELL, RAND & NATHAN, *Petitioners,*

v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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v.

HON. MORTIMER M. CAPLIN and ROBERT S. MACCLURE and EDWARD H. HARNEY, co-partners and all other co-partners of ROBERT S. MACCLURE, as a class, d/b/a PEAT, MARWICK, MITCHELL & CO. (a co-partnership), *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

Introduction

In his brief before this Court Respondent Caplin fails to support the decisions of either Court below. Neither "standing to sue" nor "sovereign immunity" are supported as grounds for decision. For even where there is a section appearing to contain argument on either doctrine, Respondent only re-argues (in different form) that

the remedies provided by Section 7604 of Title 26, U.S.C. are adequate and exclusive.

We submit that § 7604 enforcement jurisdiction is not exclusive as a matter of law and is inadequate on the facts of this case.

Respondent Caplin pays lip service only to the doctrine of sovereign immunity upon which the decision of the Court of Appeals for the District of Columbia rests.[1] A few words in reply to Respondent's contention for further broadening of this doctrine are indicated nevertheless.

II.

The doctrine of sovereign immunity should not be extended to bar judicial review of unlawful administrative action

Carried to its logical conclusion, the Government's brief and argument in support of the application of the sovereign immunity doctrine by the Court below (Brief, pp. 31, et seq.) contend for immunity from review of all administrative action. The gravamen of Respondent's reasoning here is that otherwise, "Government's investigation would be stopped in its tracks", and that *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, at 704, *Malone* v. *Bowdoin*, 369 U.S. 643, and *Dugan* v. *Rank*, 372 U.S. 609, proscribe any judicial interference with the sacrosanct right of the Government to investigate.

We respectfully submit that this Court did not intend to enunciate, and to this day has not enunciated such a broad doctrine.

Professor Louis L. Jaffe in an article, "Suits Against Governments and Officers: Sovereign Immunity", 77 Har-

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[1] In opposition to the Petition for Certiorari, the Solicitor General all but suggested that reliance by the Court of Appeals on the sovereign immunity doctrine was in error: "This holding [of the Court of Appeals] admittedly raises questions of some difficulty [which] need not, and should not, be decided in this case." (Opposition, p. 6).

vard Law Review, No. 1 (November, 1963), stated, at page 2:

> "[T]he doctrine of sovereign immunity, whatever it is or is not, has never had, and does not have today, much impact on the judicial control of administrative illegality, that question being clearly litigable within the reach of the actions and prerogative writs against officers. Recent decisions of the Supreme Court have unfortunately encumbered the situation with a certain amount of latter-day dicta, but these dicta, narrowly construed (as they should be), ought not be permitted to impair this generality. Insofar as these decisions recognize ancient categories of immunity they are, at least, tolerable but they should not be the starting point for new generalizations which impair the long-established accountability of government to suit for alleged illegal activity."

The sworn complaint and uncontroverted affidavit before the District Court show illegality of action by Respondent rather than erroneous application of law or fact in an area where Respondent exercised discretion. If litigation of these uncontradicted facts were to be barred *ab initio* as a suit against the sovereign, the historic guaranties and protection of the rights of individuals against arbitrary and illegal actions of administrative officials would be severely curtailed. We would be one step nearer to what we most abhor, "the police state", if the policeman (for that is all a Special Agent of the Internal Revenue Service is) were to be all-powerful and his illegal actions immune from judicial scrutiny.

There is not even practical need for such absolute immunity: an orderly trial in the District Court would not "stop the investigation of the Government in its tracks". It would make sure, however, that such investigation proceeded legally and *on* the "tracks" provided by the Constitution and by the Congress.

As Professor Jaffe said in his article (Op. Cit. at p. 37):

> "Taking into account the rather special conditions underlying the availability of mandamus, one might, I think, conclude from the actual cases that nothing has changed but the manner of writing the opinion. The limitation of the writ of mandamus, which we should in the past have attributed to the breadth of official discretion, is not explained in terms of sovereign immunity. However that may be, the explanation in terms of discretion seems to me much more to the purpose. Why at this late day insist on refurbishing the doctrine of sovereign immunity? Let it, if you will, function within such limits as American history has imposed, e.g., an action for breach of contract; but where the writs and the actions have been used before, let them continue to flourish and where needs be expand. Away with fruitless and unhistorical attempts to determine whether a suit is 'really' against the state."

III.

Petitioners do not have an adequate remedy "at law"

Respondent urges this intolerably broad application of the sovereign immunity doctrine on an "end justifies the means" basis, namely, for "practical considerations of tax administration". (Resp. Br., pp. 38, seq.) He says that this suit "like any suit to quash a summons,[2] wastes time and unnecessarily burdens the Courts, as well as the Executive" (Resp. Br., p. 40), and that, "these delays and fragmented proceedings are avoided by application of the doctrine of sovereign immunity" (Resp. Br., p. 41).

In justification of a policy so foreign to our concept of justice, Respondent argues that the remedies provided by § 7604 (inadequate though they appeared to the Court of Appeals for the Second Circuit in *Application of Colton*,

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[2] A number of the cases cited by Respondent in support of adequacy of § 7604 remedies originated as complaints and motions to quash summons rather than as § 7604 enforcement petitions, e.g., *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, CA 2 (1962).

291 F.2d 487) are remedies at law, and are "orderly and adequate" (Resp. Br., p. 16). He argues further that resort to equity is barred because the possibility of arrest "indeed is no penalty at all" (p. 26), no threat of "irreparable harm" (p. 48), nor works any "significant hardship or injustice upon the Petitioners".

a. The persons summoned were likely to comply; obviating § 7604 Proceedings.

To Petitioners' argument that Peat-Marwick might preclude § 7604 review entirely by complying with the summons rather than risk arrest, expensive litigation and opprobrium, Respondent makes two strange answers: the first can be summarized in two words as "too bad", or stated in Respondent's language: "Anyone who entrusts his papers to another assumes the risk that the bailee will give them to another" (Br., p. 29).[3]

This is the very heart of the lawsuit. Petitioners contend that a taxpayer should be able to obtain the effective assistance of counsel when his liberty and property are at stake, *without* assuming a bailor's risk that his attorneys will have to turn their preparation over to Respondent. As pointed out in our main brief, the Ninth Circuit in *United States* v. *Judson*, 322 F.2d 460, not only agrees with this contention, it has gone beyond it by protecting even the accountants' work-product against abuse of subpoena power.

Respondent's second and (as Respondent terms it) "most important answer" to the argument of inadequacy of remedy (because compliance would prevent § 7604 proceedings), is that "either Petitioners or Bromley are free to bring an injunction suit against Peat-Marwick." This is exactly what Petitioners did do below. Peat-Marwick

[3] This seems to be a very ill-chosen argument in a case where Petitioners were induced to enter into the bailment by Respondent's suggestions of civil settlement negotiations. (Resp. Br., p. 3).

were Defendants; the Court had personal jurisdiction of Peat-Marwick. Respondent, however, successfully deprived Petitioners of the very remedy he now urges on them, by having this suit dismissed not only against Petitioners, but also against Peat-Marwick.

b. There is no assurance that Petitioners would be able or allowed to intervene.

Neither Petitioner nor taxpayer would be necessary parties to enforcement proceedings against Peat-Marwick. *Chapman* v. *Goodman*, 219 F.2d 802.

Respondent argues, however, that "interested third parties may also appear and assert their rights to non-disclosure of documents or information" (p. 16), citing Rule 24 F.R.C.P. as authority. He implies that either taxpayer or Petitioners could have intervened in enforcement proceedings brought in three widely-separated jurisdictions, even though they were neither actual nor necessary parties thereto. We submit that such intervention is by no means assured or adequate.

Assuming that Respondent would not have proceeded *ex parte* (as he frequently does); assuming further that Petitioners would have had adequate notice of such enforcement proceedings, such motion to intervene would not be granted as a matter of right.

Our research failed to produce one case where the Court expressly held that there is intervention of right under Rule 24(a)(2), F.R.C.P.[4] in a § 7604 proceeding.

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[4] (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other

We found no statute or authority on which to base intervention of right under Rule 24(a)(1); nor any case showing express reliance on Rule 24(b) F.R.C.P., permitting intervention as a matter of discretion.

Assuming that the Federal Rules are generally applicable to Section 7604 enforcement proceedings to the extent and "whenever the District Court deems them helpful" (7 Moore, Fed. Practice 4442), permission to intervene therefore would be subject to the discretion of the District Court. If such discretion were exercised adversely to the prospective intervenor, be it petitioners or the taxpayer, no appeal will lie, unless there was abuse. 4 Moore Federal Practice 102 and cases cited.

Neither petitioners nor taxpayer, once permitted to intervene in the District Court proceedings, would be able to appeal from an adverse order, unless Peat, Marwick & Mitchell would also prosecute the appeal. In *U. S.* v. *Boccuto*, 274 F.2d 860 (1959), where a summons was directed to an attorney, an appeal brought by the taxpayer was dismissed for want of jurisdiction because no appeal had been taken "by the aggrieved party", the attorney to whom the summons had been issued.

In summary, petitioners submit that they have shown the remedies provided by Section 7604 (somewhat loosely labeled by Respondent as remedies "at law") to be inadequate in general. They are particularly inadequate on the specific facts at bar because (1) the constitutional rights of the taxpayers required prompt protection in a centrally located forum, (2) petitioners and the taxpayer would be neither actual, nor indispensable nor necessary parties

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disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

in Section 7604 proceedings, (3) petitioners and the taxpayer have little assurance of being allowed (or being physically able) to intervene in such proceedings in three different jurisdictions; and (4) it is unlikely that Section 7604 proceedings would have been brought at all, because Peat, Marwick & Mitchell would have complied with the subpoenas.

IV.

Section 7604 jurisdiction is not exclusive.

Respondent Caplin in the heading of Chapter 1 of his brief states that Section 7604 provides an adequate and "*exclusive*" forum. The brief itself cites no authority whatever for purported exclusiveness of § 7604 review, except *U. S.* v. *Babcock* (which, as shown below, is authority for petitioners' contentions to the contrary). Nor have Petitioners found a single case to that effect.

Respondent urges that the scheme provided by Congress is "comprehensive". Congress therefore must have intended that it was "exclusive". Neither statement is correct.

If Congress had intended to make Section 7604 review the only review available, it would have said so (*U. S.* v. *Babcock*, 250 U.S. 328.)

The variety of summary proceedings provided by Section 7604 can be set in motion only by, and at the option of, the Government. These proceedings do not provide a comprehensive, let alone an adequate system of review. For they can take the form of an *ex parte* order for enforcement or even of an *ex parte* order for "arrest or attachment for contempt", all without hearing for the party summoned, let alone right or even opportunity for third parties to intervene. And, while the reported cases are few (*Sale* v. *U. S.*, 228 F.2d 682, *In re Wolrich*, 84 F. Supp. 481, *Application of U. S.*

(Carroll), 246 F.2d 762), there is no assurance that their number may not increase. If this Court upholds the contention of Respondent that as summary a proceeding as provided under Section 7604, constitutes a comprehensive, adequate and exclusive forum for the citizen-taxpayer and his attorney, there will be no protection against an over-zealous special agent who abuses subpoena power to suit his purpose.[5]

Today the agent may be over-zealous; tomorrow he might be malicious. Today the citizen-taxpayer, the attorney, or the accountant can rely on Respondent's informal statement that the Department of Justice will not initiate contempt proceedings or institute criminal prosecution under § 7610, unless the refusal to comply was "in outrageously bad faith". Today, the possibilities that severe penalties might be imposed upon Peat-Marwick might be indeed "remote"[6] (Brief, p. 44); tomorrow they might not.

The *Babcock* Case

In *U. S.* v. *Babcock*, 250 U. S. 328, 39 S. Ct. 464 the horse of an Army Captain died of strangulation because of an improper Government-furnished forage ration. The Captain was denied compensation in view of the absence of statutory provisions providing for reimbursement of this type of loss. This Court held that "where a statute *creates a right* and provides a *special remedy*, that remedy, is exclusive" (p. 331), not as Respondent puts it in his

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[5] Concededly a great part of the work papers subpoenaed in this case were prepared (and a great number of the records were collected) for the specific purpose of arriving at a civil settlement. Petitioners in having this work done by Peat, Marwick & Mitchell, relied on the statement that no criminal prosecution was contemplated. (See Respondent's Statement of Facts, Brief, p. 3.)

[6] Even this "remote" possibility, however, would cause a national accounting firm like Peat, Marwick & Mitchell to comply on or prior to the return date of the subpoena.

brief, "where Congress has specified one remedy, this normally excludes any other." (Emphasis supplied) Most important, the statute relied on expressly and *in haec verba* made the remedy created by it exclusive and final.

In the instant case, the statute involved creates no rights for taxpayer or Petitioners. It creates rights only for the Respondent and provides remedies only for Respondent. The rights of Petitioners and of taxpayer that are being sought to be enforced by the action at bar are not created by Section 7602 or Section 7604. They were created by the Constitution and the common law. They are the rights of the citizen to his basic freedoms under the Fourth and Fifth Amendments, the rights of attorneys to practice law. These rights are capable of enforcement under the general equity jurisdiction of the District Courts. There is no authority cited by Respondent (nor can any case be found by Petitioners), nor can *Babcock* be interpreted to hold that the enforcement of these rights of Petitioners and their clients was limited by Congress to the forum provided for *Respondent* in Section 7604(a).

As the Court of Appeals for the Second Circuit pointed out in *Application of Colton*, 291 F.2d 487 (C.A. 2, 1961), in construing Section 7604:

> ". . . [R]esort by the Government to the district court under § 7604(a), 26 U.S.C.A. § 7604(a), *is permissive only; this is in no way a condition to any other action.*" (Emphasis supplied.)
>
> —at p. 489

The complaint below is in the same jurisdictional status as the motion filed in *Colton*.[7]

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[7] In *Colton*, instead of an original complaint, a motion was filed to vacate the summons. The Second Circuit held that the motion had the same effect as the filing of an original complaint, raising the issues set forth in the motion.

V.

Exercise of its jurisdiction by the District Court would have expedited rather than delayed the Government's tax investigation

Throughout Respondent's brief, it is stressed that the exercise of jurisdiction by the District Court would have "stopped the Government's investigation in its tracks" or at least delayed it intolerably.

We reject the implication that the method chosen by Petitioners to obtain judicial review of the subpoenas was dilatory. On the contrary, instead of waiting to intervene in three different District Courts, Petitioners sought one centrally located forum and brought all parties concerned before the Court long before the return date of the summonses. A counterclaim for enforcement (rather than the motion to dismiss) would have brought speedy adjudication. The persons summoned, Peat, Marwick & Mitchell were before the Court. Instead of accepting the sworn allegations of the complaint as true, Respondent could have met these allegations on the merits (if, indeed, there was a *bona fide* purpose for the subpoenas). The fact that Respondent chose to proceed by motion to dismiss indicates to us that there may have been doubt as to the merits of his side of the controversy. We respectfully submit that if any delay there was, such delay was caused by the failure of Respondent to meet the challenge to the subpoena on the merits.

The requirement of otherwise financing litigation in three geographically separate circuits, the inordinate expense of obtaining new local counsel (at least in Chicago and New York) and Petitioners' choice of a single forum in which the summoned parties, Peat, Marwick & Mitchell, were equally subject to an order of enforcement, should be sufficient support for our vehement rejection of the many innuendoes in briefs filed by Respondent throughout this litigation that the suit below was brought for delay, or to have "two rounds" of litigation.

VI.

Conclusion

There having been no sworn affidavit or opposition to the uncontradicted and sworn allegations of the complaint, it is respectfully prayed that the decisions of the lower courts be reversed with directions to enter the injunction prayed for.

Respectfully submitted,

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